Discretionary Clearances:

Observations on Police Screening Strategies

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I INTRODUCTION

This paper represents an attempt at an examination of police responses to criminal events, in terms of the contrast between the relative proportions of occurrences which result in charges and prosecution and those which are discharged or vented by the exercise of some form of police discretion.

When the East York Project was initially designed, it was anticipated that the structure would provide for a complete monitoring of all police activity within the patrol district of 5411. That is, the project was staffed at the outset on a 24-hour basis with a view to facilitating the reporting by individual police officers within the patrol district at the end of their respective 8-hour shifts. As a further control, arrangements were made at the divisional level to ensure that police activity which resulted in the production of occurrence reports from 5411 would be delivered to the project headquarters as a check on the self-reporting by the individual police officers within the patrol division.[1]

Over the course of approximately three and one-half months, this voluntary self-reporting system evolved to a point where the police officers patrolling 5411 would drop into the project headquarters at 570 Main Street every two or three days and leave copies of the accumulated occurrence reports with the project staff. This development in the reporting of occurrences unfortunately had the effect of limiting the extent to which it is possible to say that the complete range of police operations was monitored within the patrol district over the one-year period. That is, it was apparent that when the officers discontinued their verbal reports at the end of their shifts, the project lost the benefit of reports with respect to a good deal of police activity which did not, for one reason or another, reach the point of being translated into occurrence reports at the divisional level.

By way of elaboration, it might be mentioned that during the first three and one-half months of project intake, from May 15 to August 31, 1972, a total of 362 occurrence reports were written up at project headquarters, representing a complete inventory of police interventions for that period of time. The project files thus provided an accurate record of police responses to claims on their resources, not only in their law enforcement and order maintenance capacities, but also in what might be termed their "social service capacity".[2] Within this latter category would be recorded such matters as reports of missing persons, sudden deaths, mental health problems, etc.—

matters which, strictly speaking, did not call for a law enforcement or order maintenance response. During that same period, only 228 general occurrence reports were written up at the divisional level. There were thus 134 matters in which the police were involved where their intervention was not recorded, or, in any event, in which the description of the intervention did not reach the stage of being translated from the police officer's notebook into a divisional occurrence report. The category of interventions which tended not to be written up in general occurrence form was, as might be expected, that involving claims on the police in their social service capacity. In the result, the consequence of the change in police reporting practices (from reports by individual police officers at the end of their respective 8-hour shift of duty in the project area, to delivery every two or three days of divisional general occurrence reports) was that the project could monitor police interventions only in their law enforcement or order maintenance roles. Only by limiting the scope of the inquiry was it possible to be assured of access to a consistent and complete set of information, for police record-keeping outside these categories could not be considered reliable unless obtained directly from the individual police officer assigned to the particular patrol area, and then only if obtained immediately after completion of his shift.

A further qualification on the range of police activity examined for the purpose of this study was that it was limited to matters involving offences against the *Criminal Code*, the *Narcotic Control Act*, the *Food and Drugs Act*, and the *Juvenile Delinquents Act*. Excluded from the scope of the study were police interventions involving such quasi-criminal provincial statutes as the Highway Traffic Act and the Liquor Control Act. The inquiry, in other words, was focused exclusively on police interventions of a criminal nature. In the result, there were some 789 such interventions over the one-year period in which the project was in operation.

II CRIMINAL OCCURRENCES AND CLEARANCE RATES

Confining ourselves, then, to the 789 criminal occurrences, we find that 315 or 39.9% were categorized for police purposes as "cleared", a term which roughly translates as the proportion of crimes known to the police which they believe have been solved.[3] The assignment of a given occurrence to a specific cleared category often appeared to be determined rather arbitrarily, particularly in view of the fact that precisely defined categories have been established for Statistics Canada's Uniform Crime Reporting System—a system developed by Statistics Canada in 1962 with the cooperation of the Canadian Association of Chiefs of Police. The clearance designations observed during the course of this study, and specifically those within the "cleared otherwise" category, in fact bore only a passing resemblance to those permitted by Statistics Canada.

Appendix 1 of *Crime Statistics*[4] provides a summary of Uniform Crime Reporting System rules and definitions, in which these instructions appear:

> In certain situations, the police may not be able to clear the offence by charge. If all the following questions can be answered 'yes', then the offence can be 'cleared otherwise':
>
> (a) Has the offender been identified?
>
> (b) Is there enough evidence to support the laying of an information?
>
> (c) Is there a reason outside the police control that prevents the laying of an information and the prosecution of the offender?

Most of the illustrations which elaborate upon the rule refer to such situations as the death or commitment for mental health reasons of offenders, complainants and witnesses, diplomatic immunity, non-extraditability, etc. Where the illustrations provide, however, for the "cleared otherwise" designation to be applied to such situations as the complainant refusing to prosecute, the offender serving a sentence on other charges or already facing a multiplicity of other charges—situations in which proceeding with the charges would serve no useful purpose—the categories begin to resemble those observed during the study. Thus, although it is doubtful that the police have available any device with which to unscramble the "cleared otherwise" categories for the purpose of complying with the standards set by the Uniform Crime Reporting System, there was nevertheless a sufficient measure of internal consistency to permit the following description of the various "cleared otherwise" categories:

(1) *Cleared unfounded*: This category included matters reported to the police as criminal events which were investigated and recorded as such, although the police themselves were apparently certain that no offence in fact occurred. For Statistics Canada purposes, this category is defined as meaning "that the investigation established the crime did not happen, was not attempted or there was no crime".[5] Although the Statistics Canada methodology advises that "unfounded occurrences" are to be subtracted from those "reported or known to the police" to arrive at the "actual number of offences",[6] project personnel were not able to discover any mechanism which would result in the exclusion of such occurrences from the Metropolitan Toronto clearance rates. Moreover, informal conversations with police personnel responsible for compilation of their records indicated a certain reluctance to exclude such occurrences, not so much because their clearance rates were thereby amplified, but because their experience had shown that matters originally described as "unfounded" might subsequently be reclassified if there should be a patterned recurrence of the event, as, for example, in situations of bad cheques: the first or second such event might qualify as unfounded, but a further repetition of the event might demonstrate a pattern which permits the attribution of a fraudulent intent.

In any event, the consequence appears to be that non-events may be included both in the area's criminal statistics and in the police clearance rates.

Examples of events which might find their way into this category would be a situation in which a repairman effected entry in the owner's absence to complete agreed-upon repairs, with the owner then seeking police verification that no one else had entered the premises; poorly secured door to premises found open and reported to police as a breaking and entering; suspected arson, etc.

(2) *Offender unknown, but property recovered; offender known only to complainant:* This category generally comprised instances of theft in which the property was recovered. Although no offender had been identified, the matter was marked "cleared" and placed in the concluded files upon recovery of the stolen property. Examples of such occurrences would be theft of auto (the largest single item), theft of bicycles, etc. Note, however, that it also included one common assault and one wilful damage. Also in this category were thefts from and by family members, among friends and associates, and by employees. Once the complainant realized that the offender must necessarily have been a relation, friend, or employee the request for further investigation was withdrawn.

(3) *Offender known to police:* In this category were

(a) events in which the offender was known to police but no charges were laid, the file generally indicating "insufficient evidence". The range of offence types included threatening, indecent exposure, break and enter, assault, theft over and under, etc. In two cases it appeared that the complainant was not satisfied with police efforts to discourage the matter being pressed further, and the complainants in these instances presented themselves before a justice of the peace where they were again advised that the proposed prosecution lacked a sufficient evidentiary base;

(b) incidents in which the police chose, as a matter of the exercise of their discretion, not to encourage the laying of charges. There was, for example, a shoplifting incident which was not prosecuted because the police elected not to jeopardize the offender's probation (on similar charges); a child-beating by a father in a common-law relationship, it appearing that the father was depressed because he was out of work and the matter being capable of referral to an appropriate social agency;

(c) instances in which the offender was known to the complainant, or in which they became acquainted during the course of the investigation, and the complainant decided to terminate the prosecution. Such cases included a rape, thefts among associates and family members, a breaking and entering by an alcoholic which the complainant declined to prosecute on being made aware of the offender's circumstances, etc.

(4) *P/W on charges outside 5411: Adult:* Occurrences originating within the patrol district of 5411 were designated "cleared" on the arrest of an offender on other charges outside the patrol district, although the potential

charges relating to the 5411 occurrence were not formally included among those recorded against the offender. Although the reasons for non-inclusion in these instances are varied, they would presumably include the police apprehension that the charges would be redundant, etc.

(5) *P/W on charges outside 5411: Juvenile:* As with the similar category relating to adults, when it was possible to identify a specific juvenile with a 5411 occurrence and that juvenile was facing charges from another area of the city, the occurrence was marked "cleared" without an attempt by the police to have the charges recorded formally against the juvenile. Again, the reasons were often that the police believed such charges to be redundant, or, as it was sometimes expressed on the cleared occurrence reports, "would serve no purpose".

(6) *Juvenile caution administered:* The police records indicated here that their intervention extended only to administering a caution on apprehension of the juveniles believed responsible for the occurrence. The juveniles might be dealt with directly by the police officer concerned or referred to the Youth Bureau.

In the result, as Table 1 indicates, of the 789 occurrences reported to and recorded by the police in the patrol district of 5411 as criminal events

TABLE 1

Criminal Occurrences and Clearance Rates
Metropolitan Toronto Police Department
5411 Patrol District: General Occurrence Reports
May 15, 1972 to May 14, 1973

Reported occurrences	789		
Cleared occurrences	315	39.9%	
Manner cleared:	Number	Per cent	Adjusted per cent*
Charge & prosecution: adult	86	10.9	27.3
Charge & prosecution: juvenile	14	1.8	4.4
Unfounded	14	1.8	4.4
Offender unknown but property recovered; offender known only to complainant	62	7.9	19.7
Offender known but insufficient evidence or police—or complainant decline to prosecute	95	12.0	30.2
P/W on charges outside 5411: adult	8	1.0	2.5
P/W on charges outside 5411: juvenile	1	0.1	0.3
Juvenile caution administered	35	4.4	11.2
Total cleared	315	39.9	100.0
Total not cleared	474	60.1	
	789	100.0	

*Adjusted to cleared occurrences only.
SOURCE: Metropolitan Toronto Police Files.

during the project's intake period of May 15, 1972 to May 14, 1973, only 315 or 39.9% were cleared, and of that number only 100 or 12.7% were processed through the courts. The remainder were cleared by a variety of devices, all of them involving some measure of police discretion, whether by recording thefts as "cleared" upon recovery of the stolen property, by declining to record charges against offenders prosecuted in other divisions of the city, or by concurring in or encouraging a decision by the complainant to refrain from pressing formal charges against an offender.

Accordingly, if one believed that the clearance rate (by which police performance is generally evaluated) represented the ratio of crime solved and prosecuted to crime reported to or coming to the attention of the police, the unqualified use of the 39.9% clearance rate would be misleading. Indeed, even within the cleared category, in 7.9% of the occurrences the identity of the offender remained unknown after the investigation was completed and the file closed, 1.8% were in fact non-events, and in 17.5% no charges were in fact laid although the event appeared to qualify as criminal and the identity of the offender was known. Thus, as Table 1 indicates, the "cleared" category comprises a range of sub-categories among which the "cleared by charge" category represents only 12.7% of the total number of occurrences, and 31.7% of all clearances.

It is important to emphasize, however, that these figures do not necessarily reflect a shortfall in police efficiency in the performance of their law enforcement and order maintenance functions. Rather, the inclusion of such a large proportion of discretionary clearances in the police performance index might well be viewed as an operational response to an extraneous standard (the clearance rate) which does not fit comfortably with the realities of the police function. In this sense, the "cleared otherwise" category represents a creative accommodation to an operational reality which merges the dual responsibilities of law enforcement and order maintenance into a concern for conflict management.[7] The immediacy of the pressures for conflict management, together with the perceived (and actual) limitations on the other formal structures of the criminal process that deal with an extended criminal clientele, promote the reliance on police discretionary techniques for processing this clientele. The reservoir of discretionary power which inheres in police control over low-visibility determinations of choice of enforcement targets, procedures, methods, timing and degree of emphasis surfaces in this context in the form of an artificial and inflated clearance rate.

The significance of the magnitude of the discretionary clearances, however, lies less in the fact that it produces an exaggerated clearance rate than in the fact that it emphasizes the relative insignificance of the other sectors of the criminal process—the courts and the correctional institutions—in the management of crime by the police. The occupational demands of the

police function have produced a large-scale system of discretionary justice in which the other sectors of the criminal apparatus are relegated to performing a backup role, invoked only when the police find it inappropriate, impolitic or inconvenient to manage conflict through the exercise of discretion.

The corollary to this observation is of course that there is no direct relationship between reported criminal activity, apprehension of offenders and invocation of the judicial process. The responsibility for law enforcement and maintenance of order, in theory a responsibility shared by all sectors of the criminal process, has in reality devolved upon the police, whether by arrogation or delegation. As a consequence, the alternative of invoking the judicial process through the "cleared by charge" route becomes but one technique in the repertoire of options available to the police for processing their clientele. The articulated responsibility of the police, that of investigation and presentation of the evidentiary base for prosecution, has evolved into an unarticulated responsibiltiy for disposition of its clientelle of offenders. The fact that the "cleared by charge" category (12.7%) represents less than half the proportion of occurrences "cleared otherwise" (27.2%) would appear to indicate comparatively little reliance upon the judicial process in the selection of an appropriate disposition. In other words, the relatively high proportion of discretionary clearances to occurrences cleared by charge suggests that the police have acquired the major responsibility for designating what portion of their clientele will be admitted to the other sectors; more specifically, the intake and hence the function of the other sectors of the criminal process are determinations largely within the control of the police.

A further corollary is that because clearance rates tend to be relied upon as the primary index of police performance, there is a considerable potential for modification of the rates to enhance the appearance of police efficiency. It is, moreover, plausible to suggest that the police are unlikely to be immune from the general tendency of all work organizations which are subject to assessment by clearance rates or similar evaluative criteria: the worker always tries to perform according to his most concrete and specific understanding of the control system. That is, apart altogether from the potential for manipulation of the performance indicators to cover a range of discretionary clearances, it is undoubtedly true that the performance criteria have a reciprocal effect on the nature of the performance itself. The features which characterize the occupational environment of the police—consistent pressure for rate production, a considerable scope for low-visibility initiatives, and an arbitrary but malleable performance index—are conducive to the development of a managerial perspective in which the nature of the function subject to assessment will be adjusted to enhance the institutional image of efficiency.[8]

Informal conversations with Metropolitan Toronto police officers at all levels of authority indicate that the current "political" climate in Toronto is

not one which encourages the under-reporting of criminal activity. To minimize crime rates, as one senior officer pointed out, would be contrary to the best interests of the force, for it would undercut their claim for increased allocations of manpower and resources. Although there would appear to be no immediate incentive to inhibit the levels of known criminal activity, there are nevertheless pressures to modify the clearance rates within those levels. These pressures vary from division to division and derive to a considerable extent from characteristics peculiar to the communities which they service. Thus, for example, there will be relatively little difficulty encountered in a downtown division in producing a clearance rate which compares favourably with other, more suburban divisions of the city, largely because much of the criminal activity in the downtown core area is of such a nature as to permit a direct correlation between offences known to the police and clearances. That is, the relatively higher frequency of drug- and alcohol-related offences, the presence of major department stores with an articulated policy of prosecuting shoplifters, and the availability of police-initiated prosecutions for morality offences such as prostitution, etc., make for little difficulty in production of a satisfactory clearance rate. Indeed, the suggestion was that there was so little pressure for enhancing clearance rates in downtown divisions that the police in those areas could afford the relative luxury of refraining from clearing, either by charge or otherwise, offences which in other divisions would automatically receive a "cleared" designation. If, for example, an offender were apprehended on a series of credit card frauds, it was likely that the only offence to be cleared would be that for which he was prosecuted. The others, although otherwise eligible for further processing, would neither be prosecuted, nor included in the offender's charge file, nor marked "cleared" for police purposes, even though the designation would obviously enhance the division's clearance rates. The indication was that the collateral offences, i.e., those for which the offender was known or believed to be responsible but for which he was not prosecuted, were included within the general occurrence reports as supplementary information, but were not submitted to the central records system. Only if the offender were considered a "rounder", i.e., a more or less permanent and professional object of police attention, or if there were a need for the expediency of "processing tolerance", i.e., a requirement that additional bargaining units be made available to encourage a negotiated plea of guilty, would these collateral offences be included within the charges submitted for prosecution.

In suburban divisions, on the other hand, the nature of the criminal activity generated by the community makes for substantially different police practices. The preponderance of housebreakings, apartment locker thefts, stolen automobiles, the presence of economically marginal shopkeepers without the resources for prosecution of shoplifters, etc.,—offences which pose obvious difficulties for a successful conclusion by investigation, apprehension

and prosecution—create considerable pressures for clearances. The police work-load in such divisions tends to be more intensively oriented to satisfying clearance expectations though follow-up of citizen-reported events rather than through police-initiated activities in which there is a close correlation between event, apprehension and prosecution. The pressure for clearances accordingly appears to translate itself into manipulation of occurrences into clearance categories which are not, strictly speaking, appropriate. Thus, while the "cleared otherwise" category is expressly directed to occurrences which do not permit of a clearance by charge for reasons "outside the police control", it tends to be used, particularly in suburban divisions, almost exclusively to accommodate one form or another of police discretion The result of such wide variations in reporting practices is of course to produce a decidedly unreliable picture of the level of criminal activity in a given division *and* of the level of police intervention in and control of that activity.

The perspective which emerges from this emphasis on rate production entails, to some extent at least, the subordination of the goals of law enforcement to the needs of the managerial function; that is, law enforcement, defined in terms of detection of crime, identification of offenders and consignment of those believed responsible to the judicial process, becomes an instrumentality for achieving those results by which the institution is to be scrutinized and judged. Prosecution, or routing the "cleared by charge" category of offenders through the courts, is accordingly useful only to the extent that it contributes to the support of the managerial role. It is perhaps for this reason that the police tend to rely relatively infrequently upon the courts, declining to process their clientele in a forum in which law enforcement as an institutional rationale is subjected to different evaluative criteria—criteria in latent conflict with those by which the police are assessed. The managerial posture, with its presumption of administrative regularity, is confronted by the presumption of innocence, with its systematized body of procedures designed to constrain official initiatives and interventions undertaken to achieve order.

As a number of commentators have observed,[9] the discretionary capacity which inheres in the police function poses a substantial threat to the rule of law in a democratic society. It is equally true, however, that resort to discretion is both a necessary and an ineradicable feature of the environment in which the police discharge their portion of the responsibility for law enforcement and maintenance of order. Given, in other words, the comprehensive, and indeed almost universal range of candidates eligible for processing, the perceived and actual limitations on the processing capabilities of the other sectors of the criminal apparatus, the nature and level of police interaction with their clientele, the insistence on one-dimensional performance indices for evaluation of a multi-dimensional task, the exercise of discretion by the police becomes a necessary innovative technique for modification of

their responsibility for law enforcement to suit their commitment (or lack of commitment) to institutional goals. All of which serves to emphasize that police discretion tends to be exercised not in random fashion, but rather in patterns consistent with the indices by which police performance is evaluated.

Of the features indicated as characterizing the occupational environment of the police (and there are of course others), most are more or less immutable. The factor most amenable to variation, it is suggested, is that of the performance criteria by which the police are scrutinized and assessed. If the police productivity indices were to be altered to conform more closely with the realities of their function, such a conversion would have a corresponding effect on the police perception of their organizational goals and hence upon the manner in which their discretion is exercised. If they were to receive credit, both personally and institutionally, for restricting the nature and extent of official interventions, for conflict management and resolution at the discretionary level, or indeed for whatever purposes were thought to be appropriate to and consistent with the rule of law, such a redefinition of organizational incentives could have a profound effect upon the texture of the administration of criminal justice.

III OCCURRENCES AND THEIR JUDICIAL CONSEQUENCES

In the preceding section, it was determined that of the 789 criminal occurrences recorded in the patrol area of 5411, 315 (39.9%) permitted of some form of clearance, with the balance of 474 (60.1%) remaining uncleared. Of the 315 which were assigned to clearance categories, 100 (or 12.7% of the total of 789 occurrences) were cleared by charge and 215 (27.2%) were cleared by some form of non-charging option available to the police. The use of non-charging or discretionary clearances in fact exceeded the use of charges by a margin greater than two to one, including determinations by the police that the reported occurrence was unfounded (1.8% of the 789 occurrences reported); that the matter could be concluded upon recovery of the property stolen or upon a request from the complainant to discontinue the investigation, although in neither event was the identity of the offender known to the police (7.9%); that the matter did not warrant prosecution, although the identity of the offender was known and the matter was otherwise eligible for prosecution (12.0%); that prosecution on the 5411 charges would serve no useful purpose because the offender was facing charges in other areas of the city (1.1%, combining adults and juveniles); or that a juvenile caution represented the most appropriate disposition (4.4%).

It is now proposed to confine our attention specifically to those occurrences which were cleared by charge, following them through the judicial process to determine the extent to which police decisions about the eligibility of occurrences for further processing were ratified or rejected in the judicial sector. A brief explanation of the statistical base is, however, first in order.

As was indicated in the introduction,[10] the unit with which we were concerned was the occurrence report, i.e., the report prepared for police purposes to describe a given criminal event. Certain problems of definition are encountered, however, in tracking a given occurrence through the court system—problems not confronted when the information sought was limited to compilation of clearance categories and rates. Out of a given occurrence might come several charges against several offenders, as a consequence of which the case unit for purposes of court follow-up becomes a multiple of the number of charges times the number of offenders. By way of illustration, a single occurrence report describing a house-breaking, for example, might evolve after investigation into a unit comprising charges of breaking and entering and possession of stolen property against three offenders. Thus, the unit for our present purposes becomes a multiple of the number of charges or counts times the number of identified offenders (2×3 discrete elements).

The solution adopted by Robert Hann[11] to permit a computerized tracking through the process was to define his case unit in terms of its key count or charge, identifying the key count by means of a graduated ranking system based on the actual and anticipated demand on court resources by that charge. Having thus identified the key count, he then was able to identify which among a possible several offenders was associated most closely with that count to create his "key offence" unit for use in the court follow-up. This technique served not only to produce a consistent set of identification criteria for determination of the final outcome in terms of findings of guilty or not guilty, but also permitted a description of the proportions of charges and offenders which were discharged from the judicial process en route to a guilty/not guilty determination. Thus, in the example provided, if the final outcome was that one offender pleaded guilty to one charge of possession of stolen property and charges were withdrawn against the other offenders, it would appear in Hann's results as one finding of guilt and five withdrawals.

For the purposes of the EYCLRP court follow-up study, however, if a given occurrence resulted in criminal charges, regardless of how many and against whatever number of offenders, that occurrence was followed through to its conclusion. If, after following the occurrence through the court process, it was determined that all charges were withdrawn, the occurrence was described exclusively in terms of that last stage. If some charges against

some offenders were withdrawn, with the case proceeding against at least one offender, it too was followed to its conclusion and appears in the statistical follow-up as an acquittal or guilty finding, as the case may be. Those charges and those offenders connected with a given occurrence which were eliminated in the course of a finding against at least one offender on at least one charge consequently do not appear in the statistics. Thus, again using the previous example, that occurrence would be described as a finding of guilty, from which one can conclude that the occurrence produced a finding of guilt against at least one offender on at least one charge.

With this description of the information base in mind, an examination of Table 2 indicates that of the 100 occurrences referred to the judicial sector for prosecution, 67 (or 67% of the occurrences cleared by charge) resulted in conviction at the adult level; an additional 14 (14%) resulted in some form of juvenile court disposition.[12] In short, if one approaches the criminal process from the point of view of occurrences and their judicial consequences, rather than from a perspective involving individual offenders and their specific charges, it would appear that police charging decisions

TABLE 2

Occurrences and their Judicial Consequences
Metropolitan Toronto Police Department
5411 Patrol District: General Occurrence Reports

May 15, 1972 to May 14, 1973

Cleared occurrences	315		
Cleared by charge	100	31.7%	
Judicial outcome:	Number	Per cent	Adjusted per cent*
guilty verdict	67	8.5	67
juvenile court dispositions	14	1.8	14
all charges withdrawn before trial	7	0.9	7
last charge dismissed during or after trial	5	0.6	5
not guilty verdict	1	0.1	1
pending	3	0.4	3
unknown	3	0.4	3
Cleared by charge	100	12.7	100
Cleared otherwise or not cleared	689	87.3	
	789	100.0	

SOURCE: Metropolitan Toronto Police Files.
*Adjusted to occurrences cleared by charge only.

are ratified in the judicial sector to the rather remarkable extent of 81%. By contrast the "leakage" from the criminal process at the court level is relatively small: in 7% of the occurrences, the charges were withdrawn by the complainant or the prosecutor before trial; in 5% of the occurrences the charges were dismissed during or after trial by the prosecutor or judge; in 1%, the prosecution resulted in a verdict of not guilty; and in 6% of the occurrences submitted for prosecution, the results were either pending (3%) or unknown (3%) when the project was concluded.

Because it was assumed that juvenile occurrences referred for prosecution would necessarily result in findings of delinquency, all such occurrences have been assigned to the "juvenile court disposition" category; the leakage categories accordingly contain only criminal occurrences involving adult offenders. Table 3 therefore provides for a reorganization of the court follow-up information with the juvenile occurrence category omitted. The substance of the results, however, remains the same, with 77.9% of the occurrences at the adult level concluding in a finding of guilty and the balance being largely discharged from the system through withdrawals, dismissals and verdicts of not guilty.

TABLE 3

Occurrences and their Judicial Consequences: Adult Only
Metropolitan Toronto Police Department
5411 Patrol District: General Occurrence Reports

May 15, 1972 to May 14, 1973

Cleared occurrences: adult
Cleared by charge: adult

Judicial outcome:	Number	Per cent	Adjusted per cent*
guilty verdict	67	8.6	77.9
all charges withdrawn before trial	7	.9	8.1
last charge dismissed during or after trial	5	.7	5.8
not guilty verdict	1	.1	1.2
pending/unknown (combined)	6	.8	7.0
Cleared by charge (adult)	86	11.1	100.0
Cleared otherwise or not cleared	689	88.9	
	775	100.0	

SOURCE: Metropolitan Toronto Police Files.
*Adjusted to adult occurrences cleared by charge only.

Directing our attention to the 67 occurrences which eventuated in a finding of guilty, Table 4 indicates that only 19 (28.4%) of the occurrences were transferred from the judicial sector to the prison system. This figure represents 19% of the occurrences cleared by charge, 6% of the total of 315 cleared occurrences, and 2.4% of the 789 reported occurrences. In the result, only 2.4% of the criminal events which permitted an intervention by the police in their criminal law enforcement capacity produced a client for intake into the prison system. Given the 77.9% rate of ratification of police charging decisions by the courts, it becomes a tenable proposition that the police in fact bear the major responsibility for definition of the intake and hence of the function of the other sectors of the criminal process.

The differences in tracking techniques between the EYCLRP and the Hann study (adverted to earlier in this paper) pose limitations on the extent to which the results of the two projects can be meaningfully compared. As Tables 5 and 5A indicate, there are major points of variance, particularly in the percentages relating to pre-trial withdrawals and guilty verdicts. The significance of the differentials is perhaps clearer if they are expressed as indicating, for example, that 8.1% of the *occurrences* tracked in the EYCLRP study resulted in all charges being withdrawn before trial; by contrast, in Robert Hann's study, 33% of all *charges laid* were dropped or

TABLE 4

Occurrences and their Penal Consequences
Metropolitan Toronto Police Department
5411 Patrol District: General Occurrence Reports
May 15, 1972 to May 14, 1973

Occurrences cleared by charge
Conviction and imprisonment

Outcome:	Number	Per cent	Adj. %*	Adj. %†	Adj. %‡
no prison	16	2.0	5.1	16	23.9
potential prison	32	4.1	10.2	32	47.7
mandatory prison	19	2.4	6.0	19	28.4
juvenile court dispositions	14	1.8	4.4	14	—
judicial leakage	13	1.6	4.1	13	—
pending/unknown	6	.8	1.9	6	—
discr. clearance	215	27.2	68.3	—	—
uncleared	474	60.1	—	—	—
	789	100.0	100.0	100.0	100.0

SOURCE: Metropolitan Toronto Police Department Files.
*Percentage adjusted to base of 315 cleared occurrences.
†Adjusted to base of 100 occurrences cleared by charge.
‡Adjusted to base of 67 occurrences resulting in conviction.

withdrawn before trial. Further, in the EYCLRP study, 77.9% of those occurrences which produced one or more charges resulted in a conviction; whereas in Hann's study, 56% of those *charges* laid resulted in a finding of guilt. The variations thus do not indicate inconsistent findings, but rather reflect the differences in the statistical base. It is not surprising, therefore, that there should be more gross charges withdrawn than there would be

TABLE 5

Occurrences Cleared by Charge and Completed: Adults
Metropolitan Toronto Police Department
5411 Patrol District

May 15, 1972 to May 14, 1973

Occurrences cleared by charge: Adult	86
Occurrences with charges pending	6
Completed occurrences	80

Manner completed:	Number EYCLRP	% EYCLRP	% Hann
Charges withdrawn before trial by pros. or compl....	7	8.75	33
Charges dismissed at or during trial.....	5	6.25	10
Not guilty verdict.....	1	1.25	1
Guilty verdict.....	67	83.75	56
Total occurrences cleared by charge and completed..	80	100.00%	100.0%

TABLE 5A

Disposition of Completed Occurrences: Guilty Verdict
Metropolitan Toronto Police Department
5411 Patrol District

May 15, 1972 to May 14, 1973

Completed occurrences: guilty: # = 67

Manner of disposition:	#EYCLRP	%EYCLRP	%EYCLRP (adj)	% Hann	%Hann (adj)
No potential prison.....	16	23.9	20.00	25.0	14
potential prison.....	32	47.7	40.00	62.5	35
mandatory prison.....	19	28.4	23.75	12.5	7
Total completed and convicted.....	67	100.0%	83.75%	100.0%	56%

SOURCES: Metropolitan Toronto Police Department Files.
Robert G. Hann, *Decision Making in the Canadian Criminal Court System: A Systems Analysis*, Table 12.2, at p. 460.

occurrences in respect of which all charges would be withdrawn; that there should be more occurrences than gross charges resulting in conviction.

It remains to comment briefly on the difficulties encountered in collecting information with respect to the outcome of those occurrences which resulted in charges.

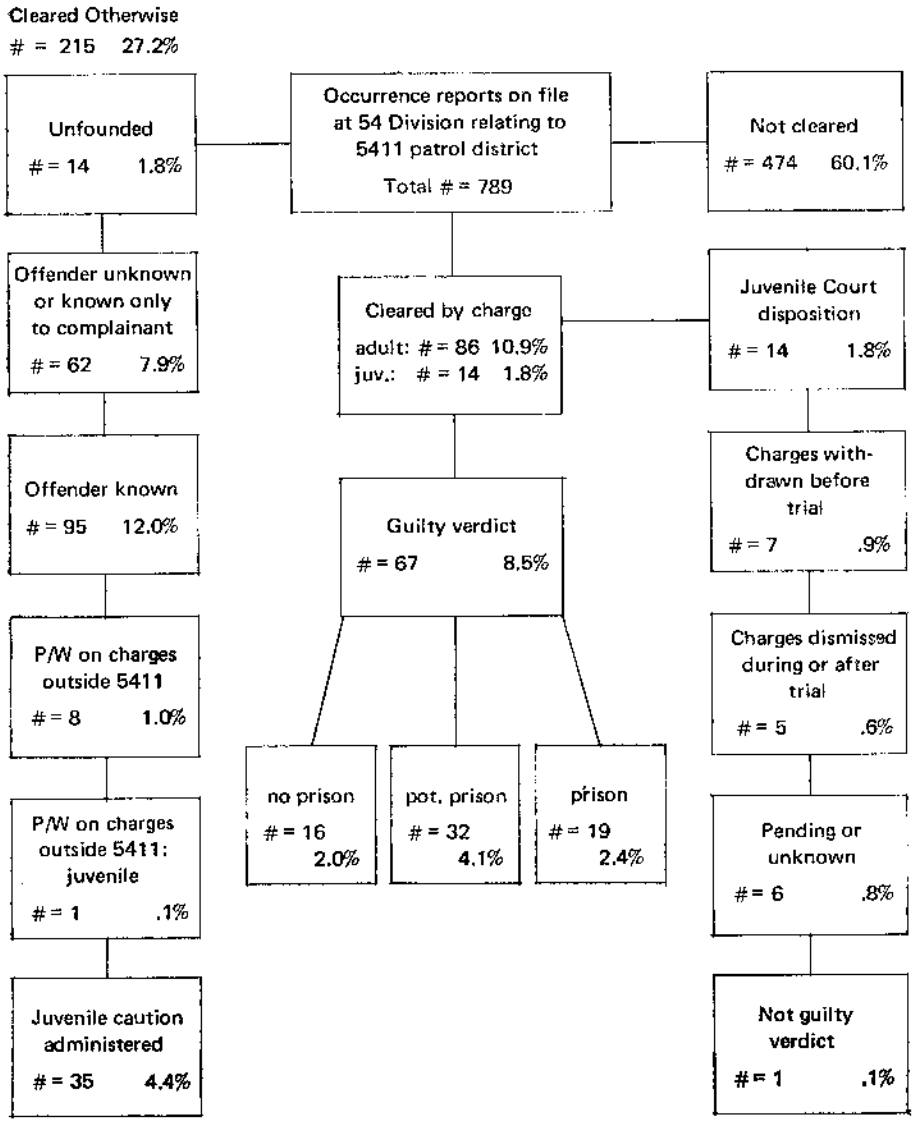
Records were of course maintained at the divisional level of the "cleared by charge" category of occurrences, and these occurrence reports generally speaking contained data concerning the number and nature of charges laid and the number and names of identified offenders associated with that occurrence. Although the record design employed by the police clearly contemplated the incorporation of information on the judicial outcome, it did not appear that any consistent effort had been made to include such data. It was thus possible to obtain reliable information at the divisional level only with respect to the fact of the occurrence and the charges and offenders associated with it. To obtain accurate records of the disposition of these occurrences, it was necessary to secure access to the Criminal Identification Bureau of the Metropolitan Toronto Police at 590 Jarvis Street, where records were maintained of individual offenders (but regrettably not of general occurrences). It was then necessary to trace the offenders identified at the divisional level through the C.I.B. central registry, linking the divisional occurrence report with the items recorded against the individual offender. This procedure was of course painstakingly slow and required that a member of the research staff spend several weeks poring through police files at both 54 Division and the central registry.

Apart altogether from the considerable frustration involved in attempting to determine the judicial outcome of a given set of occurrences, it is perhaps a fair inference that the police themselves do not attach any particular significance to the correlation of occurrences routed through the judicial process and their judicial consequences. The lack of coherent procedures or facilities for tracking occurrences through the courts perhaps indicates a certain indifference to the consequences which follow consignment of a given occurrence to the judicial process. Once the matter has been designated as "cleared by charge" for police purposes, the police performance indices cannot be affected further by that particular occurrence.

Alternatively, these difficulties could indicate an indifference to the relevance of assessing the judicial process within the same set of institutional criteria as are applied to the police. That is, in the absence of a statistical mechanism to relate occurrences to their judicial consequences, the police are presumably assessing the courts according to other institutional criteria—criteria which may tend to amplify police apprehension that a disproportionate number of charges are being withdrawn or dismissed and that numerous offenders are being improperly released as a consequence. In fact, however, as Table 3 and Diagram 1 indicate, the courts would appear to be

DIAGRAM 1

Flowchart of Disposition of Criminal Occurrences
Metropolitan Toronto Police Department
5411 Patrol District
May 15, 1972 to May 14, 1973



reasonably supportive of police decisions to tender an occurrence for further processing. Some 77.9% of the occurrences "cleared by charge" at the adult level produced at least one guilty offender on at least one charge. By contrast, the proportion of occurrences discharged by pre-trial withdrawals (8.1%), by dismissals at or during trial (5.8%), and by not guilty verdicts (1.2%) was relatively small.

Moreover, the mortality rate at the court level, in terms of the number of occurrences which managed to avoid a guilty verdict (15.1%) would appear to be considerably less than the proportion of occurrences discharged at the police level through non-judicial or discretionary vents (27.7%). One obvious qualification on this observation is of course that the results of discretionary venting by the police are less visible and hence may be both more extensive and less amenable to calculation than the discharges at the court level.

The fact that 77.9% of the occurrences "cleared by charge" at the adult level resulted in a verdict of guilty would appear to lend credence to the assertion that the police do not charge innocent people. But to assess the results as a confirmation of the reliability of the presumption of administrative regularity is to obscure the significance of the court follow-up. The more cogent observation is surely that the police do not charge all the guilty people.

Some studies have suggested that the rate of criminality among the population at large may range as high as 91.5%[13] There would appear to be an almost universal eligibility for prosecution, both on the basis of the indictable offence levels indicated in the self-reporting studies and on the basis of the approximately 40,000 regulatory offences said to be available for enforcement in Canada.[14] The proportion of the general population targeted for law enforcement purposes, however, is substantially less than 91% and the problem becomes one of determining how it is that the criminal clientele is selected.

The theories advanced to account for the caseload in the criminal process have been legion. On one end of the spectrum are explanations involving biological factors inherent in the criminal personality;[15] and on the other end are those involving forces which recruit offenders in order to delineate social norms.[16] The latter portion of the spectrum perhaps provides a more adequate explanation and is particularly helpful for present purposes for the insights it offers into the contribution of the police in the identification and disposition of offenders.

Durkheim advanced the thesis that crime ought properly be viewed as an integral feature of the social order, concluding from the fact of its historical continuity that crime was perhaps performing a sort of bonding function, providing the community with a focus for the recognition of shared interests and values. The ceremonies and rituals which characterize group

action against criminal deviance provide an opportunity for a greater appreciation of communal identity and coherence, thereby contributing to the stability of social life. "Crime brings together upright consciences and concentrates them",[17] and thus serves the functional purpose of strengthening the community through collective rejection of the deviant. It further appears that certain of the agencies designed to inhibit deviance actually assist in its perpetuation.[18] Hence Erikson's hypothesis that organizational needs in social ordering may so depend upon deviance that "forces operate in the social structure to recruit offenders and to commit them to long periods of service in the deviant ranks."[19]

In this sense, the police may be described as the agents of social control with primary responsibility for the recruitment of offenders. In the execution of this responsibility, the policeman acquires as a byproduct of his occupational environment a set of predictive formulae which facilitates the identification of offenders. These formulae have both a retrospective and a prospective agency: they operate retrospectively to assemble categories of past experience for prospective application to future situations. The formulae are, moreover, shared with a remarkable degree of organizational consistency within any given police force, less because of selective or biased recruitment procedures than because of what has been termed "convergent expectations".[20] Although subject to a substantial rate of replacement, the police are able nevertheless to maintain continuity in their patterns of response because of the convergence of "everyone's expectation of what everyone expects of everyone—with the new arrivals' expectations being molded in time to help mold the expectations of subsequent arrivals."[21] Consequently, persons designated as deviant for purposes of the criminal process tend to share a good many similar characteristics, for their identification is at least as dependent upon the operational perspectives of the agencies of social control as it is upon the deviants themselves.[22] Although the police constitute only one of the agencies of social control, they are delegated a considerable portion of this responsibility, for it is they who control the selection of offenders from the population at large and determine which among them will be tendered for prosecution.

IV CONCLUSION

The routing of occurrences represented in Table 4 and Diagram 1 clearly suggests the presence of social forces other than the criminal process in the management and resolution of conflict. Of the total number of occurrences reported to the police as criminal events, only 39.9% were accessible to some form of intervention by the criminal process. The residue of 60.1% was left for resolution (or non-resolution) within the community.

Of the 39.9% of occurrences which yielded to official intervention, some 27.2% were sorted out at the police level and disqualified from

making further demands upon the criminal system. In the result, only 12.7% of the occurrences were deemed eligible for further processing by remission to the judicial sector. On consignment to the courts, approximately 8.5% (or 81% of those whose eligibility was established by charge) fulfilled their administrative prophesy of guilt and resulted in the imposition of a judicial sanction. A further 1.6% (or 13% of those eligible) were rejected through withdrawals, dismissals or not guilty verdicts, with the remaining .8% unknown or still awaiting disposition. Of the 8.5% of occurrences which precipitated in the application of criminal penalties, a mere 2% were appropriated by the correction systems, with the remaining 6.5% being transferred back to the community through sentences involving conditional or absolute discharges, suspended sentences, probation or monetary sanctions.

In short, an extensive system of formal and informal vents operates to screen out all but 2% of those occurrences which have the potential for engaging the full range of institutional controls available for the management and resolution of conflict. It is suggested, moreover, that there is a considerable potential for refining and exploiting the informal processes in the criminal system to permit the acquisition of a measure of control over the judicial and correctional intake. One of the least immutable constants in the criminal system is the performance index by which the institutional efficiency of the police is assessed. It is sufficiently flexible, in any event, that a modification of the organizational assessment criteria could have a reciprocating impact on the exercise of discretion by the police, and hence upon the characteristics and function of each of the sectors of the criminal process. It should therefore be possible, through the adjustment of organizational incentives, to convert the exercise of police discretion into patterns which are both supportive of the institutional goals of the police and consistent with the concept of the rule of law.

Diagram 1 and the related tables further serve to suggest that a decision to increase or improve the capabilities of the courts or correction systems would have relatively little impact on the quality of criminal justice. Although the gross intake might be increased, diminished, accelerated or retarded, the primary responsibility for determination of the qualitative features of the intake resides with the police. Not only do they have the major responsibility for governing admission to the other sectors of the criminal process, but the police have also acquired, as a consequence of the discretionary power which inheres in their function, a major portion of the responsibility for disposition of the criminal clientele. Accordingly, measures designed to influence the patterns of police discretion offer a relatively more fruitful opportunity for effecting qualitative changes in the administration of criminal justice.

NOTES

[1]Upon receipt of a complaint of a criminal nature, the investigating police officer prepared what was referred to as a "general occurrence report", setting out particulars with respect to the complainant, the offender, the narrative of events and the patrol district within which the offence took place.

[2]This classification of the types of claims made upon the police for assistance roughly parallels that developed by James Q. Wilson, *Varieties of Police Behavior*, (New York: Atheneum, 1970), 18, except that Wilson's "information" and "service" categories are here combined within the more general category of "social service".

As Wilson observed [at p. 16, n. 1], the distinction between order maintenance and law enforcement is similar to distinctions made by other authors. Michael Banton notes the difference between "law officers" and "peace officers" in his *The Policeman and the Community*, (London: Tavistock, 1964), pp. 6-7. Egon Bitner distinguishes between "law enforcement" and "keeping the peace" in his analysis of patrolmen handling derelicts, "The Police on Skid Row: A Study of Peace-Keeping", in *American Sociological Review*, 32 (October, 1967), pp. 699-715. At a higher level of generality, Eugene P. Wenninger and John P. Clark note that the police have both a value maintenance and a goal attainment function: "A Theoretical Orientation for Police Studies", in Malcolm W. Klein, *Juvenile Gangs in Context*, (Englewood Cliffs: Prentice-Hall, 1967), pp. 161-172.

[3]As Skolnick has pointed out, the designation "cleared" is a police organizational term bearing no direct relation to the administration of criminal law. It merely means that the police believe that they know who was responsible for a given criminal occurrence. It does not indicate, however, *how* the occurrence was cleared: Jerome Skolnick, *Justice Without Trial*, (New York: John Wiley & Sons, Inc., 1966), 168.

[4]*Crime Statistics*, (Ottawa: Information Canada, 1973), 113.

[5]*Crime Statistics, 1971, ibid.*

[6]*Ibid.*, at p. 7.

[7]Or, as Dallin H. Oaks observed in "Studying the Exclusionary Rule in Search and Seizure", *University of Chicago Law Review*, 37 (1970), 665-757, at p. 728: "The patrolman is oriented to approach incidents that threaten order not in terms of enforcing the law but in terms of 'handling the situation'." Although the substance of Oaks' remarks were directed to demonstrating that the immediate impact of judicial attempts to control police operations through such evidentiary constraints as the "exclusionary rule" fell primarily upon the prosecutor, his premise is of equal application in this context, namely, that there is relatively little latitude for the operation of judicially-imposed constraints because the object of much of the challenged conduct is the maintenance of order rather than the prosecution of crime. The police, in other words, have a variety of motives other than the facilitating of prosecutions.

To similar effect is the Report of the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, (Washington, D.C.: U.S. Government Printing Office, 1967), 91:

> A great majority of the situations in which policemen intervene are not, or are not interpreted by the police to be, criminal situations in the sense that they call for arrest, with its possible consequences of prosecution, trial and punishment.

[8]For a discussion of what has been termed the "reactivity of the social indicators" in the context of police operations, see Lawrence J. Center and Thomas G. Smith, "Crime Statistics—Can They Be Trusted?", in *The American Criminal Law Review*, 11(1973), 1045-1086, particularly pp. 1065-1074. At pp. 1065-1067:

> Because police are generally held responsible for controlling crime, political pressure to reduce the crime rate is often focused on them. . . . The local patrolman [has] great discretion in deciding how to record a citizen complaint, or whether to record it at all. . . . [S]ome police have responded to increased political pressure by either downgrading the seriousness of offences or failing to report certain offences that come to their attention. . . . The range for accidental or deliberate misclassification of crime is great. Motivation for purposeful misclassification can come from the realization that these statistics are viewed as a measure of police performance, and that the police have the power to 'improve' their own performance merely by deliberately 'downgrading' or failing to record certain offences. This is a clear example of what . . . researchers call the reactivity of the social indicator: the use of crime statistics as a measure of the police recorder's performance influences the diligence with which he gathers these statistics.

Although Smith's primary focus concerned the inadequacies of the F.B.I.'s Uniform Crime Reports, his identification of "political" pressures upon the police to depress or submerge the reporting of criminal events as one of the major factors in that inadequacy is helpful for present purposes. Similar observations, specifically directed to clearance rates, were made by Skolnick, *supra* note 3, at p. 168:

> What the policeman does in order to amplify clearance rates may have the consequence of both weakening the validity of the clearance rates and interfering with legality and aims of law enforcement.

Skolnick's remarks were prompted by his observation that the police need for the appearance of efficiency tended to render criminality a commodity of exchange, thereby contributing to a reversal of the hierarchy of the penalty structures. In return for the offender's cooperation in admitting to prior offences, the police provide a reduction of charges, the concealment of actual criminality and freedom from investigation of prior offences.

[9]See, e.g., Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry*, (Baton Rouge, La.: Louisiana State University Press, 1969); Joseph Goldstein, "Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice", *Yale Law Journal*, 69(1960), 543; Sanford H. Kadish, "Legal Norm and Discretion in the Police and Sentencing Processes", *Harvard Law Review*, 75(1962), 904; and Wayne R. LaFave, "The Police and Non-Enforcement of the Law", *Wisconsin Law Review*, (1960), 104.

[10]*Supra*, n. 1.

[11]Robert G. Hann, *Decision Making in the Canadian Criminal Court System: A Systems Analysis*, (Toronto: Centre of Criminology, University of Toronto, 1973), 95 ff.

[12]Limitations of time and availability of personnel precluded the possibility of tracing juvenile disposition to determine whether a finding of delinquency was actually made. Rather, it was assumed for the purposes of this study that a charge of delinquency would produce a finding of delinquency, a result referred to in Table 2 as a "juvenile court disposition."

[13]James S. Wallerstein & Clement J. Wyle, "Out Law-Abiding Law-Breakers", *Federal Probation*, 25(April, 1947), 110, noted in Richard R. Korn and Lloyd W. McCorkel, *Criminology and Penology*, (New York: Henry Hold and Company, Inc., 1959), p. 5.

[14]Law Reform Commission of Canada Working Paper #2, *The Meaning of Guilt : Strict Liability*, (Information Canada: Ottawa, 1974), 10.

[15]An extreme example of this position might be that of Alfred Wallace, celebrated with Darwin as co-founder of the theory of evolution, writing in 1899:

> In the coming century phrenology will . . . prove itself to be the true science of the mind. Its practical uses in education, in self-discipline, in the reformatory treatment of criminals, in the remedial treatment of the insane, will give it one of the highest places in the hierarchy of the sciences.

Quoted by John D. Davies, *Phrenology, Fad and Science*, (New Haven: Yale University Press, 1955), p. ix and reproduced in Korn and McCorkle, *supra* note 13, at p. 212.

[16]See, e.g., Emile Durkheim, "The Normal and the Pathological", in *The Sociology of Crime and Delinquency*, ed., Marvin E. Wolfgang, Leonard Savitz and Norman Johnston,

(New York: John Wiley and Sons, Inc., 1970), and Kai T. Erikson, *Wayward Puritans*, (New York: John Wiley and Sons, Inc., 1966).

[17]Emile Durkheim, *The Division of Labor in Society*, (New York: The Free Press, 1964), 102.

[18]See, e.g., *A Report of the Commission of Inquiry into the Non-Medical Use of Drugs: Treatment*, (Ottawa: Information Canada, 1972), at p. 12. In assessing the Matsqui, B.C. centre for treatment of drug-dependant persons, the Report states:

> These results led . . . to the hypothesis that the pilot treatment unit program inadvertently promoted a 'well-adjusted, well-educated dope fiend' successful in getting himself over the barrier from the illegitimate world to the legitimate. But the greater self-understanding, formal education, and greater social skills gained in the superior treatment unit were enough to help him to be more successful in the illegitimate world.

[19]Erikson, *Wayward Puritans, supra* note 16, at pp. 13-15.

[20]Thomas C. Schelling, *The Strategy of Conflict*, (New York: Oxford University Press, 1960), 92.

[21]*Ibid.*

[22]For a more comprehensive elaboration of the processes of status ascription, variously termed "categorization", "typification", "labelling", or "routinization", see Rubington and Weinberg, *Deviance/The Interactionist Perspective*, (New York: The Macmillan Company, 1968). Of particular assistance is Thomas J. Scheff, "Screening Mental Patient", *op. cit.*, p. 172 for his analysis of the extent of the contribution of factors external to the patient and his condition in the certification of mental incompetence.

Statistical Follow-up of Criminal Occurrences in Toronto Patrol Area 5411:

An Examination of the Relationships between Victims and Offenders

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1. *Intake Level I: The Reporting of Criminal Occurrences to the Police*

The assimilation and analysis of criminal occurrence patterns in East York suggests that criminal events may usefully be examined in terms of the relationship between their participants, victim and offender. The East York Community Law Reform Project data indicates that a significant proportion of the occurrences reported to the police involved victims and offenders whose relationships with each other preceded the criminal event and their contact with the criminal process. Accordingly, rather than viewing the criminal event as an isolated phenomenon involving only the offender and his specific criminal act, it is helpful for present purposes to approach the event as the culmination or continuation of a process of social interaction between victim and offender.[1] This perspective suggests a casual-functional matrix in which the contribution of the victim is assessed as a necessarily relevant factor to the understanding of the criminal event.

As one proceeds along the continuum of possible relationships from strangers to intimates, a distinction emerges between cases in which the event constitutes and defines the relationship, i.e., criminal events involving what are essentially strangers, and those in which the relationship generates the criminal event, an event grounded in but representing but one facet of that prior association. It is within this latter type of case that one finds the paradigm of intimates engaged in some form of strategic interaction which escalates to the point where one or the other of the parties to the conflict invokes the assistance of the police as part of a search for a controlling medium to assist in the renegotiation or termination of that relationship. Whether the authoritative third-party status of the police is sought for the continued escalation of the strategic interaction or for interpersonal conflict resolution, it is rarely sought unequivocally with a view to precipitating criminal sanctions *per se*. Rather, the complainant entertains a vague expectation that the offending party or his conduct will somehow thereby be contained. The motivation in applying to the police for assistance, in other words, is less to prosecute than to limit or escalate the dimensions of the conflict by means of an authoritative third-party intervention. It is suggested, moreover, that it is often the absence of alternative support systems which suggests the use of the police, as the most visible, responsive, 24-hour social service agency.

Between the paradigms of strangers and intimates, there is an intermediate range on the continuum in which the criminal event, though not *generated* by the prior relationship, nevertheless can be said to *arise* out of

the context of that association. Although these relationships lack the intensity of the bilateral monopoly which defines the paradigm of intimates, they do demonstrate a sufficient measure of reciprocity and interdependence to suggest that the parties may be using the criminal process for interpersonal conflict resolution. It is implicit within the dynamics of the relationship either that the association will continue beyond the intervention of the criminal process or that the criminal process will be used to sever the association. Thus, for example, the complainant (if not both participants) in a conflict involving husband and wife, boyfriend and girlfriend, employer and employee, etc., may expect the relationship to survive the criminal event and the intervention of the criminal process. In such cases, it can be suggested that the criminal process is being invoked as an aid to their interpersonal conflict resolution, for the purpose of renegotiating or realigning their relationships. Alternatively, within the same kinds of relationships, it may be that the complainant is invoking the criminal process with the expectation of utilizing its authoritative third-party status to conclude the strategic interaction by terminating the relationship.

While it is not possible to attribute a specific motivation to those who sought assistance from the police in the East York sample, it is possible to suggest that a significant portion of the clientele of the criminal justice system is made up of victims and offenders engaged in dyadic conflict; that they are ingested by the criminal justice system in the course of their attempts to renegotiate or terminate their relationships; and that this clientele can be located within the categories of offences against the person and offences against property.

Accordingly, with a view to determining what portion of the criminal justice system's capacity is directed to management of interpersonal conflict, the occurrences reported to the East York Project were divided into six categories: (1) offences against the person; (2) offences against property; (3) offences against public order; (4) victimless offences; (5) criminal motor vehicle offences; and (6) juvenile status offences.[2]

This organization was imposed primarily with a view to isolating those offence types which by definition would involve offenders and specifically identifiable victims other than the state or its representatives (such as the police). By separating the categories which preclude the possibility of victim-offender interaction, either prior to or as part of the criminal event, and restricting the inquiry to offences against the person and offences against property, it becomes possible to interpret the data in terms of the relationship, if any, between victim and offender.

As Table 1 indicates, there were a total of 789 criminal occurrences reported, of which the major proportion were offences against the person (74 or 9.4%) and offences against property (645 or 81.7%). Of the 719

offences in these categories (offences against the person and offences against property), 259 (36.0%) permitted some form of clearance by the police; that is, the matter was investigated by the police at least to the point where they were satisfied that they had identified the person believed responsible for the occurrence, or, alternatively, that the matter could be concluded upon recovery of the stolen property. Although the caseload is substantially reduced by the elimination of uncleared offences, their exclusion will not materially affect the interpretation of the results because our primary interest is in assessing the proportion of pre-existing relationships in the criminal justice system. Thus, only those cases which have been cleared by the police are eligible for the application of criminal charges and admission to the criminal justice system. One further qualification on the data also warrants mention; there were 78 occurrences in which it was not possible to determine the relationship, if any, between victim and offender from the information available. Of this number, 62 occurrences, generally involving stolen automobiles or bicycles, had been designated "cleared" by the police upon recovery of the stolen property, although there had not been an identification of the offender believed responsible. A further 14 offences reported to the police had been cleared and marked "unfounded"; as no offence had been found to have been committed, no one could be designated as an offender. The information available did not permit a determination of the relationship, if any, between victim and offender in the remaining 2 occurrences. This category of relationships has been included in the tables as "unknown" and distinguished from those occurrences in which it was unequivocally clear that there was no relationship.

TABLE 1

Criminal Occurrences Reported to Police

Metropolitan Toronto Police Department
5411 Patrol District: May 15, 1972 to May 14, 1973

Offence	Number	Per cent
Crimes Against the Person:		
Common Assault	33	4.2
Assault bodily harm	10	1.3
Assault with intent	1	0.1
Rape	1	0.1
Indecent Assault	11	1.4
Robbery	14	1.8
Threatening	4	0.5
	74	9.4

TABLE 1 (*Concluded*)

Offence	Number	Per cent
Crimes Against Property:		
Theft under $50	272	34.5
Theft $50 and over	173	21.9
Possession under	3	0.4
Possession over	4	0.5
Attempted Theft	16	2.0
Break and Enter	81	10.3
Fraud	4	0.5
False Pretences	10	1.3
Forgery	10	1.3
Wilful damage	62	7.9
Counterfeiting	1	0.1
Arson	8	1.0
Attempted entry	1	0.1
	645	81.7
Offences Against Public Order:		
Assault police officer	1	0.1
Obstruct police	2	0.3
Indecent exposure	15	1.9
Concealed weapon	1	0.1
Creating a disturbance	10	1.3
Breach of probation	1	0.1
Discharge a firearm	2	0.3
Impersonate an officer	1	0.1
Obscenity	1	0.1
Vagrancy	1	0.1
	35	4.4
Victimless Offences:		
Narcotics	9	1.1
Alcohol	1	0.1
Attempted suicide	3	0.4
	13	1.6
Criminal Driving Offences:		
Fail to remain	2	0.3
Impaired driving	12	1.5
Driving with over 80 mg	2	0.3
Dangerous driving	1	0.1
Criminal negligence	1	0.1
Driving while suspended	1	0.1
	19	2.4
Non-Criminal Juvenile Delinquencies:		
Glue sniffing	3	0.4
	3	0.4
Total Occurrences	789	100.0

Table 2 indicates the relationships between victim and offender over all categories of offence among the 315 occurrences which were cleared by police. Thus, at the first level of intake into the criminal justice system, the reporting of criminal events to the police, pre-existing relationships were noted in 31.7% of the cases; in 25.7% it was evident that there had been no prior association between victim and offender; in 24.8%, the relationship, if any, was unknown, generally because the matter had been cleared without the investigation proceeding to the point of identifying the offender; and in 17.8% of the cases, the nature of the offence precluded the possibility of a specifically identifiable offender.

The data was then reorganized to eliminate the offence types which by definition excluded the possibility of victim-offender relationships (the "not applicable" item). Table 3 thus describes the frequency of relationships between victim and offender in the categories of cleared offences against the person and offences against property. Within these categories, one finds a series of relationships varying in intensity from family, friends and relatives to neighbours to commercial associations.[3] The presence of pre-existing

TABLE 2

Relationships between Victim and Offender
Cleared Criminal Occurrences

Metropolitan Toronto Police Department
5411 Patrol District: May 15, 1972 to May 14, 1973

Reported occurrences (all categories)	789
Cleared occurrences	315

	Number	Per cent	Adjusted per cent*
Some Relationship:			
Family	12	1.5	3.8
Neighbour known	21	2.7	6.7
Neighbour unknown	23	2.9	7.3
Other friends and relatives	28	3.6	8.9
Commercial	16	2.0	5.0
	100	12.7	31.7
No relationship	81	10.3	25.7
Unknown	78	9.9	24.8
Not applicable	56	7.1	17.8
Total cleared	315	40.0	100.0
Total not cleared	474	60.0	
	789	100.0	

SOURCE: Metropolitan Toronto Police Files.
*Adjusted to cleared occurrences only.

relationships was observed in 38.6% of the cleared occurrences within these categories, with that of "neighbour known and unknown" accounting for the largest single type of relationship. The data further indicates that in 31.3% of the cases, there had not been a pre-existing relationship between victim and offender in cases involving offences against the person and offences against property. In 30.1% of these cases, the relationship, if any, was unknown.

The figures in the adjusted per cent column in Table 3 demonstrate the relative frequency of prior relationships when the "unknown" occurrences (those in which it could not be determined whether there was a pre-existing relationship) are excluded. As indicated, the major portion of these occurrences were cleared by an investigation which fell short of identifying the offender. Because no offender was identified, these occurrences cannot be taken into the criminal justice system by way of charge and may accordingly be excluded for present purposes, i.e., assessing the frequency of claims on the criminal justice system by victims and offenders whose

TABLE 3

Relationships between Victim and Offender
Cleared Offences against the Person and Property Offences

Metropolitan Toronto Police Department
5411 Patrol District: May 15, 1972 to May 14, 1973

Reported occurrences (all categories)	789
Reported occurrences against person and property	719
Cleared occurrences against person and property	259

	Number	Per cent	Adjusted per cent*
Some Relationship:			
Family	12	4.6	6.6
Neighbour known	21	8.1	11.6
Neighbour unknown	23	8.9	12.7
Other friends and relatives	28	10.8	15.4
Commercial	16	6.2	8.9
	100	38.6	55.2
No relationship	81	31.3	44.8
Unknown	78	30.1	
Total	259	100.0	100.0

SOURCE: Metropolitan Toronto Police Files.

*Excluding occurrences in which relationship unknown. These occurrences were primarily offences cleared on recovery of stolen property but in which no offender was identified, or occurrences designated "unfounded" by the police. In either event, no offender had been or could be identified by the police.

associations with each other pre-existed the criminal event and who may be invoking the criminal justice system for the purpose of resolving or escalating their interpersonal conflict. From this standpoint, it can be said that 55.2% of the criminal events reported to and cleared by the police involving specifically identifiable victims and offenders arose out of the context of some form of pre-existing relationship.

When the categories of offences against the person and offences against property are examined separately (Tables 4 and 5), we find that the frequency of prior associations in crimes against the person (84.9%) is considerably higher than that of property crimes (43.0%). It should be noted, however, that the frequency of prior associations within the property crimes category is itself of some considerable significance because of the relatively larger number of such offences. Numerically, property offences represented 645 of 789 (81.7%) of the total police caseload of reported occurrences in the project area. That 43% of the cleared property offences and 84.9% of the offences against the person in which the offender was specifically identified should arise out of some form of prior association between victim and offender suggests the presence at the first level of intake into the criminal justice system of a substantial clientele which could be said to be engaged in some form of interpersonal conflict.

TABLE 4

Relationships between Victim and Offender
Cleared Offences against the Person

Metropolitan Toronto Police Department
5411 Patrol District: May 15, 1972 to May 14, 1973

Reported offences against the person	74
Cleared offences against the person	54

	Number	Per cent	Adjusted per cent*
Some relationship:			
Family	8	14.8	15.1
Neighbour known	12	22.2	22.6
Neighbour unknown	2	3.7	3.8
Other friends and relatives	20	37.0	37.7
Commercial	3	5.6	5.7
	45	83.3	84.9
No relationship	8	14.8	15.1
Unknown	1	1.9	
Total	54	100.0	100.0

SOURCE: Metropolitan Toronto Police Files.

*Adjusted to exclude occurrences in which relationship unknown. As indicated, there was only one such occurrence in this offence category.

2. *Intake Level II: The Consignment of Criminal Occurrences to the Courts*

It is now proposed to examine the police responses to these occurrences to determine what portion of this clientele reaches the second level of the criminal justice system, the courts. Collaterally, by determining what proportions of previously associated victims and offenders are transferred to the judicial sector by the police, it should be possible to gauge the effect, if any, of the presence of a pre-existing relationship between victim and offender on the police use of charging options in their disposition of cleared criminal occurrences.

As indicated, of the 719 occurrences in the categories of offences against the person and offences against property, 259 (36.0%) were cleared by the police. If we exclude from this figure the occurrences in which the investigation stopped short of identifying the offender (62); the occurrences which were designated "unfounded" after police investigation (14); and the occurrences involving juvenile offenders (43), we are left with 140 occurrences which were theoretically eligible for prosecution at the adult level. Of the 140 cases eligible for prosecution, charges were laid in only 16 of the 46 eligible offences against the person and 32 of the 94 eligible property offences. There

TABLE 5

Relationship between Victim and Offender
Cleared Property Offences

Metropolitan Toronto Police Department
5411 Patrol District: May 15, 1972 to May 14, 1973

Reported offences against property	645
Cleared offences against property	205

	Number	Per cent	Adjusted per cent*
Some relationship:			
Family	4	2.0	3.1
Neighbour known	9	4.4	7.0
Neighbour unknown	21	10.2	16.4
Other friends and relatives	8	3.9	6.3
Commercial	13	6.3	10.2
	55	26.8	43.0
No relationship	73	35.6	57.0
Unknown	77	37.6	
Total	205	100.0	100.0

SOURCE: Metropolitan Toronto Police Files.

*Adjusted to exclude occurrences in which relationship unknown.

was thus a total of 48 charges within the categories of offences against the person and property offences, with the remaining 92 occurrences disposed of by means of some form of non-charging option.

When the categories of offences against the person and property are considered together (Table 6), we find that 41.7% of the caseload of the criminal justice system for these types of offences at the court-intake level

TABLE 6

Relationships and Prosecutions
Cleared Offences against the Person and Property Offences

Metropolitan Toronto Police Department
5411 Patrol District: May 15, 1972 to May 14, 1973

Reported occurrences against person and property	719
Cleared occurrences	259
Cleared and eligible for prosecution (adult)	140

	Charge #	(%)	No Charge #	(%)
Some relationship:				
Family	0	(0.0)	10	(10.9)
Neighbour known	2	(4.2)	10	(10.9)
Neighbour unknown	1	(2.1)	4	(4.4)
Other friends and relatives	11	(22.9)	13	(14.1)
Commercial	6	(12.5)	6	(6.5)
	20	(41.7)	43	(46.8)
No relationship	23	(47.9)	45	(48.9)
Unknown	5	(10.4)	4	(4.3)
Total	48	(100.0)	92	(100.0)

TABLE 6A

Relationships and Prosecutions

Cleared Offences against the Person and Property Offences

Occurrences eligible for prosecution (adult)	140
Occurrences prosecuted	48

	Relationship			No Relationship or Unknown		
	No.	(%)	Ratio	No.	(%)	Ratio
Charge	20	(31.8)	1	28	(36.4)	1
No charge	43	(68.2)	2.2	49	(63.6)	1.8
Total	63	(100.0)		77	(100.0)	

SOURCE: Metropolitan Toronto Police Files.

is comprised of occurrences in which there was some form of pre-existing relationship between victim and offender. The remainder of the intake is comprised of occurrences in which either there was no such relationship (47.9%) or the relationship, if any, was unknown (10.4%). When the offence categories are considered individually (Tables 7 and 8), the indications are that 68.7% of the prosecutions for offences against the person

TABLE 7

Relationships and Prosecutions
Cleared Offences against the Person

Metropolitan Toronto Police Department
5411 Patrol District: May 15, 1972 to May 14, 1973

Reported offences against person	74
Cleared occurrences	54
Cleared and eligible for prosecution (adult)	46

	Charge		Charge	
	No.	(%)	No.	(%)
Some relationship:				
Family	0	(0.0)	8	(26.7)
Neighbour known	1	(6.3)	7	(23.3)
Neighbour unknown	1	(6.3)	1	(3.3)
Other friends and relatives	7	(43.6)	11	(36.7)
Commercial	2	(12.5)	1	(3.3)
	11	(68.7)	28	(93.3)
No relationship	5	(31.3)	2	(6.7)
Total	16	(100.0)	30	(100.0)

TABLE 7A

Relationships and Prosecutions

Cleared Offences against the Person

Occurrences eligible for prosecution (adult)	46
Occurrences prosecuted	16

	Relationship			No Relationship or Unknown		
	No.	(%)	Ratio	No.	(%)	Ratio
Charge	11	(28.2)	1	5	(71.4)	2.5
No charge	28	(71.8)	2.6	2	(28.6)	1
Total	39	(100.0)		7	(100.0)	

SOURCE: Metropolitan Toronto Police Files.

and 28.1% of the prosecutions for property offences involve a prior association between victim and offender. Although the significance of these proportions of pre-existing relationships at the charging level must be qualified by the small size of the sample, it is nevertheless a fair inference from the tables that such occurrences account for a substantial portion of the workload of the criminal justice system.

TABLE 8

Relationships and Prosecutions
Cleared Property Offences

Metropolitan Toronto Police Department
5411 Patrol District: May 15, 1972 to May 14, 1973

Reported property offences	645
Cleared property offences	205
Cleared and eligible for prosecution (adult)	94

	Charge		No Charge	
	No.	(%)	No.	(%)
Some relationship:				
Family	0	(0.0)	2	(3.2)
Neighbour known	1	(3.1)	3	(4.8)
Neighbour unknown	0	(0.0)	3	(4.8)
Other friends and relatives	4	(12.5)	2	(3.2)
Commercial	4	(12.5)	5	(8.1)
	9	(28.1)	15	(24.1)
No relationship	18	(56.3)	43	(69.4)
Unknown	5	(15.6)	4	(6.5)
Total	32	(100.0)	62	(100.0)

TABLE 8A

Relationships and Prosecutions
Cleared Property Offences

Occurrences eligible for prosecution (adult)	94
Occurrences prosecuted	32

	Relationship			No Relationship or Unknown		
	No.	(%)	Ratio	No.	(%)	Ratio
Charge	9	(37.5)	1	23	(38.3)	1
No charge	15	(62.5)	1.7	47	(61.7)	2.0
Total	24	(100.0)		70	(100.0)	

SOURCE: Metropolitan Toronto Police Files.

If one examines the distribution of charging options within the relationship categories (by making horizontal comparisons within the individual relationship categories in Tables 6, 7 and 8), one finds that the ratio of charging options to non-charging options tends to vary with the intensity of the relationship. If one accepts the vertical ordering of the relationship categories as a rough approximation of the anticipated variation in the intensity of possible relationships, one finds that the ratio of charging to non-charging options increases from 0:10 in the "family" category to 1:5 in the "known neighbour" category; to 1:4 in the "unknown neighbour" category; to 1:1.8 in the "other friends and relatives" category; to 1:1 in the "commercial" category. It would accordingly appear that the use of charging options increases as the nature of the relationship becomes less intense. Again, although the size of the numerical base suggests a need for caution in interpreting these figures, the same inverse ratio between the use of charging options and the intensity of the relationship holds both for offences against the person and property offences when these offence categories are considered separately (Tables 7 and 8).

Table 6A indicates that when the relationship categories are collapsed to "relationship" or "no relationship" and both offence categories are considered together, it appears that the presence of a pre-existing relationship has little, if any, effect on whether the occurrence will proceed to prosecution. The probabilities against prosecution over both categories were 2.2:1 with a pre-existing relationship and 1.8:1 in the absence of such a relationship. There does, however, appear to be a significant difference in the likelihood of prosecution when the offence categories are considered separately (Tables 7A and 8A). Again, although the numbers are perhaps too few to attach much weight to the results, Table 7A suggests that the odds against a prosecution for an offence against the person in a situation involving a prior association between victim and offender (2.6:1) are almost precisely reversed in the absence of such a relationship (1:2.5). In the result, it would appear that an individual offender stood a relatively better chance of avoiding prosecution for an offence against the person if his victim was one with whom he had some prior association, despite the fact that the matter had reached the stage of being reported to the police.

Moreover, a comparison of Tables 7A and 8A suggests that the offender's opportunities for avoiding prosecution for an offence against the person (2.6:1) are greater than those for a property offence (1.7:1), even though both offences may involve a prior relationship between victim and offender.

One factor which might account for these differentials is that in cases of common assault (the largest single type of offence against the person) the charging option resides with the complainant; the police, in other words, do not accept responsibility for initiating prosecutions for common assault

and instead advise complainants to attend before a justice of the peace and swear out an information if they wish to pursue the complaint to prosecution. As a consequence, given the high number of prior relationships in cases of common assault (24 of 26), one might expect that the attendant low rate of charging (7 of 24) among common assaults involving victims and offenders with a prior association would weight the whole category of offences against the person toward a low rate of use of charging options. The low frequency of charging options in common assaults would accordingly depress the

TABLE 9

Relationships and Prosecutions
Cleared Common Assault Occurrences

Metropolitan Toronto Police Department
5411 Patrol District: May 15, 1972 to May 14, 1973

Common Assaults Reported	33
Cleared and eligible for prosecution (adult)	26

	Charge		Charge	
	No.	(%)	No.	(%)
Some relationship:				
Family	0		7	
Neighbour known	1		6	
Neighbour unknown	1		1	
Other friends and relatives	5		3	
Commercial	0		0	
	7	(87.5)	17	(94.4)
No relationship	1	(12.5)	1	(5.6)
Total	8	(100.0)	18	(100.0)

TABLE 9A

Relationships and Prosecutions: Common Assault

Occurrences eligible for prosecution (adult)	26
Occurrences prosecuted	8

	Relationship			Relationship or Unknown		
	No.	(%)	Ratio	No.	(%)	Ratio
Charge	7	(29.2)	1	1	(50.0)	1.0
No charge	17	(70.8)	2.4	1	(50.0)	1.0
Total	24	(100.0)		2	(100.0)	

SOURCE: Metropolitan Toronto Police Files.

frequency of charging options both in the category of offences against the person as a whole and with reference to property offences.

To test this hypothesis, the common assault occurrences were segregated (Tables 9 and 10) and their charging frequencies contrasted with the remaining offences against the person. As might be expected, the indications are that charging frequencies appear to depend more on whether the prosecutorial initiative resides with the police or with the complainant than on the presence or absence of a prior relationship between victim and offender.

TABLE 10

Relationships and Prosecutions
Cleared Offences against the Person other than Common Assault

Metropolitan Toronto Police Department
5411 Patrol District: May 15, 1972 to May 14, 1973

Other reported offences against the person	41
Cleared and eligible for prosecution (adult)	20

	Charge		No Charge	
	No.	(%)	No.	(%)
Some relationship:				
Family	0		1	
Neighbour known	0		1	
Neighbour unknown	0		0	
Other friends and relatives	2		8	
Commercial	2		1	
	4	(50.0)	11	(91.7)
No relationship	4	(50.0)	1	(8.3)
Total	8	(100.0)	12	(100.0)

TABLE 10A

Relationships and Prosecutions: Other Offences against the Person

Occurrences eligible for prosecution (adult)	20
Occurrences prosecuted	8

	Relationship			Relationship or Unknown		
	No.	(%)	Ratio	No.	(%)	Ratio
Charge	4	(26.7)	1	4	(80.0)	4
No charge	11	(73.3)	2.8	1	(20.0)	1
Total	15	(100.0)		5	(100.0)	

SOURCE: Metropolitan Toronto Police Files.

Thus, the ratio of police-initiated prosecutions within the category of offences against the person (8:12 or 1:1.5) is higher than the ratio of complainant-initiated prosecutions (8:18 or 1:2.3). The presence of a prior relationship, however, appears to have a less noticeable effect on the decision to prosecute, whether by police or complainant (1:2.8 and 1:2.4 respectively). Although it would clearly be preferable to test this sample with a larger base, the tentative indications from the data are that private complainants tend not to use the option of charging as often as the police when they have the responsibility for initiating the prosecution, and, moreover, that this tendency creates a lower rate of prosecutions for offences against the person than for property offences.

3. *The Clientele Identified*

The examination of criminal occurrence patterns in the patrol district of 5411 suggests the presence of significant proportions of previously-associated victims and offenders. Among the occurrences reported to and cleared by the police over all categories of offence, pre-existing relationships between victim and offender were noted in 31.7% of the cases. When the focus was confined to offences against the person and property offences—thereby excluding victimless crimes, motor vehicle offences, juvenile status crimes and what were termed offences against public order—the proportion of pre-existing relationships among the occurrences cleared by police was 55.2%. It was also observed that although the frequency of such relationships was considerably higher among offences against the person than property offences (84.9% and 43.0% respectively), the relatively larger number of property offences meant that a significant portion of the police workload was made up of offences involving prior associations between victim and offender.

When the occurrence patterns were organized to permit an examination of the frequency of pre-existing relationships at the court-intake level, it was noted that 23.3% of the occurrences which culminated in adult prosecutions over all offence categories involved previously-associated victims and offenders. Within the categories of offences against the person and property offences, 41.7% of the adult occurrences consigned to the courts by way of charge involved victims and offenders whose relationships with each other preceded the criminal event.

It is within this 41.7% that one could expect to find the phenomenon of strategic interaction between previously-associated victims and offenders culminating in the invocation of the judicial process. As the conflict escalates, one or the other of the parties to the dispute requests assistance from the police, with a view either to limiting or extending the dimensions of the conflict. The request for police intervention, in other words, is itself part of the process of strategic interaction. The complainant is more anxious to contain the offending party in his conduct than to ensure that he is appropriately

punished. In the result, the search for an authoritative third-party intervention culminates in a demand upon the criminal justice system for assistance in the renegotiation or termination of the relationship between victim and offender.

The fact that an inverse ratio was observed between the intensity of the prior relationship and the use of charging options suggests the efficacy of short-term interventions by the police as an adjunct to interpersonal conflict resolution. It will be recalled that the frequency of occurrences resulting in criminal charges declined as one moved along the continuum of possible relationships from "strangers" to "commercial" to "other friends and relatives" to "neighbours" to "family". Thus, none of the reported occurrences involving members of an immediate family proceeded to prosecution; all such occurrences were in fact vented out of the criminal justice system through some form of non-charging option. That the criminal conflict generated within family relationships could be defused at the police level without laying criminal charges suggests that the motivation for seeking police intervention was to secure the assistance of an authoritative third party for interpersonal conflict resolution and, moreover, that that end was achieved without the need for further penetration into the criminal justice system. Further, that there should be a progressively greater use of criminal charges as the intensity of the association declines suggests the presence of dynamics within relationship-generated conflict which militate toward extra-judicial resolution of conflict which otherwise qualifies for criminal prosecution.

It will also be recalled, however, that when the relationship categories were collapsed in order to determine whether the presence of a prior association between victim and offender affected police charging practices, it was observed that there was no gross correlation between the presence of such relationships and the police use of charging options. Further, it appeared that the decision to prosecute was more a function of the location of the responsibility for initiating the prosecution, whether with the police or the complainant, than the presence of a pre-existing relationship between victim and offender. It was also noted that when the prosecutorial initiative resided with private complainants (as in the cases of common assault), they tended to proceed to prosecution less often than did the police when the decision to prosecute was primarily within police control (as in property offences and offences against the person other than common assault).

The examination of criminal occurrence patterns in the 5411 patrol district also demonstrates that relatively few of the occurrences otherwise eligible for prosecution are in fact disposed by way of charge. Although the majority of occurrences reported were vented out of the criminal justice system at the police level, the decision to screen a case out of the system or consign it to the courts appears not to depend on the presence of a pre-existing relationship between victim and offender. Accordingly, it would

appear worthwhile to examine police charging practices somewhat more closely to determine whether the factors which influence their decision to charge derive from characteristics inherent in the criminal event and its participants or from concerns peculiar to police organizational and operational needs. If, in other words, police charging practices should prove to be largely a function of their own institutional concerns, consignment to the judicial sector may not be the most appropriate disposition for those whose presence in the criminal justice system is largely a consequence of their efforts at renegotiating or terminating their relationships with each other.

APPENDIX

Preface

One often hears the complaint that a statistical report does not enable the reader to get a feel for the subject under discussion. Any report based on numbers will be difficult to absorb—especially in a criminal justice system with 40,000 offences and over 2,000,000 criminal occurrences a year.

The following appendix tries in a small way to bridge the gap between the statistical reports that precede it and the theoretical paper that follows. It is just a glimpse at people's attitudes toward the criminal justice system and the phenomenon of victimization. But without this attachment, it is impossible to provide the reader with a true view of the extent of the research.

Client Interviews

VICTIM No. 1: Bill

Offence: False pretences—July 15, 1972.

Interview date: February 15, 1973.

1. *The Offence*

Bill operates a small, retail men's wear store. On July 15, 1972 he sold several items of clothing to a customer who claimed to have been referred to him by the manager of the nearby hotel. The customer gave him a cheque in the amount of $72.00 which was subsequently returned by the bank marked "no such account". On the cheque's return, Bill first contacted the hotel manager to ascertain whether the customer had indeed been referred by him. The manager verified the referral and advised that the customer often spent Friday evenings in the hotel's beer parlour. It was then arranged that should he reappear, the hotel manager would contact the victim.

Bill's normal practice was to protect himself from such frauds by permitting chequing privileges only to known customers, or occasionally to those with some claim to associations with him, as, for example, through

referrals from known customers. In the latter event, however, he required satisfactory proof of identification. Moreover, he generally requested that the merchandise be picked up the following day, permitting him to cash or certify the customer's cheque in the interim. On limited occasions, he made exceptions to these rules, permitting a purchase by cheque if the customer were accompanied by his wife and otherwise appeared respectable and reliable. Although he sometimes took in as much as $2,000 per week in cheques, he claimed to be able to limit the number of frauds to two or three per year.

On this occasion, however, Bill's suspicions were allayed by the fact that the customer claimed to have been referred by the hotel manager, that he was methodical and selective in his purchases, that he showed satisfactory proof of identification, and that he claimed to have his own tailor whom he would prefer to do the necessary alterations. Thus, Bill elected to forego his usual device of alterations for ensuring that he would have sufficient time to cash or certify the customer's cheque.

Bill had a long history of prior victimization, all of it in connection with his clothing business. His primary risks were fraudulent cheques and what he referred to as "smash and grabs"—risks which he rather philosophically acknowledged as inevitable: he was compelled by the nature of his business to accept cheques and to display his merchandise in the store windows. He took what precautions he could by limiting chequing privileges, by installing an S.I.S. alarm system, and by renting the apartment above the store to reliable tenants to give the appearance of activity about the premises, and simply calculated his losses (which he put at 3% of his gross) into his prices and profit margins. He had, moreover, moved his business in 1962 in the hope of minimizing his incidence of victimization. His prior location was, according to the victim, "... a tough area ... there are fellows there during the day that never worked—they hung around continually ... mostly Anglo-Saxons, too ... a bad area—purse snatching, women getting beat up at night, filthy language, women couldn't walk the street at night ... the area got progressively worse and then they cut off my insurance so there was no way I could stay there. ... Also, it's not the loss of merchandise. It's a pain in the ass. You know, the police phone you at three in the morning and it got so bad that one year I must have had eight of them. ..."

2. *Contact with the Criminal Process*

(a) *The police*

After assuring himself that he had indeed been defrauded and taking what steps he could to locate the offender, Bill then reported the matter to the police. The police attended to take particulars and suggested that he should

attend at Room 6 of the Old City Hall to swear out a warrant for the arrest of a "person unknown", advising also that he should not attempt to apprehend the offender himself but rather should contact the police who would then effect the arrest on the authority of the outstanding warrant. Bill did not in fact attend at the Old City Hall, largely because he was given the impression by the attending police officer that there was little to be gained by obtaining a warrant for the arrest of a "person unknown". Whether it is in fact a useless procedure or whether its sole purpose is to protect the police from allegations of false arrest if they attempt to make an arrest on third party information after the event, or whether indeed it is a form of demonstration of good faith required by the police to satisfy them as to the victim's willingness to prosecute [there were a number of explanations advanced by the various police officers with whom this procedure was discussed], when the offender was arrested two days later and arraigned with a number of counts of false pretences on transactions throughout the city, this particular occurrence was not among them. The victim was neither advised of the offender's apprehension nor of his subsequent conviction.

Because the subject's victimization was related solely to his business operation, his requests for police assistance tended to be in the nature of adjuncts to the conduct of that business. That is, he invoked the assistance of the police in the case of breaking and enterings not in the expectation that the offender would be apprehended, but rather to satisfy his reporting obligations for insurance purposes. In the case of fraudulent cheques, the police were called only after he had exhausted his own attempts at collection. Again, he had no real expectation that the offender would be apprehended, but rather notified the police much in the manner of referring a hopeless account to a collection agency—as the last and least productive of a sequence of remedies available to him for collection of his trade accounts.

As a consequence, Bill had somewhat limited expectations for assistance from the police. He professed himself accordingly to be satified with their performance, despite the fact that he had rarely received any tangible results in terms of apprehension of offenders from the police and despite what appear to have been inadequate police services to the victim: *e.g.*, being advised to attend at City Hall to swear out an information for the arrest of a person unknown if he wished to pursue the matter further; not being advised of the offender's apprehension and conviction; arriving at a break-in with the alarm still ringing prior to the police arrival, despite the fact that the victim had to come approximately 15 miles from his residence; on a prior occasion, when the police apprehended and prosecuted an offender for possession of stolen property following a break-in, being requested several times to appear in court with the requests generally being relayed only the night before his attendance was required and on all but one occasion that attendance proving unnecessary.

(b) *The courts*

When he was called to testity on that occasion, moreover, the case was dismissed when the trial judge concluded that the goods had not been specifically identified by the victim. The victim indicated that this rather upset him, but he did not appear to direct his upset to the trial judge.

> BILL: I know in my own mind that that was my merchandise, but the way he worked it he was right. I mean, that manufacturer might have made 400 dozens of that sweater. That fellow might have bought the sweater in the west end for all I know. Like the judge said, I can't be 100% certain that those were my goods.

VICTIM No. 2: Mike

Offence: Armed Robbery, April 26, 1973.

Interview date: August 8, 1973.

1. *The Offence*

Mike operates a corner milk store on a residential-commercial street. He has been robbed five times during the five-year period in which he has held this franchise, the last two robberies occurring within a two-week period in late April and early May of 1973. He was interviewed primarily in connection with the fourth robbery, it being one of the more recent and also one of the robberies in which the offenders had been apprehended, prosecuted and convicted.

On April 26, 1973 two men entered the store approximately ten minutes before the 11 p.m. closing time, inquired what time the store closed and moved around the store as if making casual purchases. Mike recalled seeing the men in the store on three or four prior occasions in the week preceding the robbery and was accordingly not apprehensive about their presence just before the store closed. While Mike busied himself with his preparations for closing, one of the men moved around the counter and placed what appeared to be a gun wrapped in newspaper against his back, advising him that it was a hold-up. The other man then moved in brandishing a Hire's Root Beer bottle and instructed Mike to open the cash register.

> MIKE: The time I was robbed when the guy just put the thing on my back I was more scared of the bottle of pop 'cause I don't know if they're going to take my money and give it to me over the head—I didn't mind the shot 'cause that would kill me. The thing was I didn't see what was on my back, but I saw the bottle and I thought they're going to kill you, but they're going to go ahead and hit you on the head with the bottle and you think that's how the thing will be over.

After collecting the money from the cash register, the robbers pulled the telephone from the wall and made their escape—to be captured by the police approximately 15 minutes later.

The corner milk store operation is almost necessarily a high-risk target for armed robberies. The economics of the franchise arrangement (a fixed income of approximately $600.00 per month, plus 1% of the gross receipts) militate against the proprietor hiring additional help, either to take the day's receipts to the bank or to deter prospective robbers by their presence. As a result, a robbery executed just before closing time can almost be guaranteed a take of between $600.00 and $900.00. The folklore among milk store operators appears to be that their vulnerability varies inversely with the number of store personnel present. That is, it is said to require two robbers to rob a single store manager, one to isolate the manager and one to collect the money from the till; if the manager were accompanied by an employee, the robbery would require three men, etc., so that the robbers would be assured of outnumbering their victims by at least a margin of one; as the number of milk store personnel increases, it becomes correspondingly less likely that a sufficient number of men can be mobilized to execute the robbery.

MIKE: I had about two years and it was quiet, and now in two or three weeks I have the two robberies. The thing is, I'm by myself in the store all the time. That makes it easier, you know, to rob me. They know I'm by myself all day and night so that's easier. Most of the stores, they have two guys.

INTERVIEWER: How is it you never have any help?

MIKE: I don't need it, I guess, I don't need help. I don't need someone to help me, just to protect me.

Although he is reluctant to protect himself by engaging an employee for the critical three-hour period between eight and eleven p.m., he did insist after the fourth robbery that the company install what appears to be a videotape camera of the type used for closed circuit security purposes. It is not, however, a functioning unit, except that if it were plugged in (which it was not) it could be made to pan from left to right to give the impression of taking in the whole store.

The victim attributes his liability to robbery to factors inherent in the nature of his business operation rather than to characteristics peculiar to the neighbourhood within which he operates. Because the economics of the situation virtually dictate a solo operation, he believes that robbers come from outside the community to execute their robberies in a relatively safe and productive environment.

During the course of the interview, the subject appeared generally relaxed, except when describing the personal effects of the series of robberies. In these discussions, he became extremely agitated, his voice quavered and he appeared on occasion to be on the verge of tears in describing how apprehensive he had become about operating the store on his own, especially during the three hours prior to closing.

MIKE: Well, I'm frightened many times you know, about the job. I couldn't stand it and I'm not sure I'm going to stay. You see, I'm scared for

everybody. If somebody comes behind my counter to look for something I get frightened . . . I get more tired of the three hours at night than for the 11 hours in the morning, more tired, from those last three hours, 'cause I'm scared and I try most of the time to keep myself in the back, near the freezer. I don't like to stand behind the counter . . . I like to leave the door [pointing to the rear door] open a ways sometimes so I could run out. It's funny, you know, it can be—and I'm sick, I'm upset after someone would rob me. . . . It makes me nervous. You see, I was happy in my job, you know. I liked it to work in my store, I like to talk to the customers. . . . Sometimes people, you know them, you don't want to be scared but still you are scared. Sometimes I am thinking to myself, there's nobody in the store now. Sometimes at night, I think who's going to come in now, you know, who's going to get in, you open the door and you know him.

Of the five occasions on which he had been robbed, the fourth robbery (April 26, 1973) was clearly the most unsettling, principally because he had been robbed by men who he believed to be *bona fide* customers. Whatever reservations he might previously have had about these two men had been allayed when their previous purchases in the preceding week passed without incident. He was now forced to acknowledge to himself that he could not distinguish between customers and robbers and that he could be robbed by almost anyone who came into his store.

MIKE: I never thought it when they robbed me then that night. They were people like me and you, dressed all right, you know, they don't look like bums or something, they didn't scare me the first time I saw them come in, they just look like regular customers. That thing makes me—now I'm scared for everybody.

2. *Contact with the Criminal Process*

(a) *The police*

The police have quite a creditable record in connection with robberies of this particular milk store, having apprehended the persons responsible in three of the five cases. Although demonstrably satisfied with police performance with reference to the robberies, Mike nevertheless rather resented their responses to his requests for assistance in shoplifting matters.

MIKE: Like I was saying now, if you get a guy who is shoplifting, you call the police, they come here, they get the name—and you have the guy and they still want you to go to court, you know, to lose all your day. I think that's the police, they should have the guy right away in court. Why don't they do it? . . . They get paid for all this, you know, sending a guy to court . . . But I see them and they ask me, do you want to go to court with that guy, and I say, no, it doesn't matter, so they let him go. . . . You have nothing about it for 50 cents, to go to court, the police should go—that's how they do it in my country [Greece].

It would appear, however, that Mike has reconciled himself to the need to handle shoplifting problems on his own. As he became known in the community, moreover, the incidence of petty theft seems to have diminished.

MIKE: I used to catch them all the time, but not lately. I have known—people have known me after so many years, you know, and now I know who to watch, so I have no more problems there. Just—they know me, some kids know me, and they don't try nothing.

(b) *The courts*

Although arrests were made in three of the five robberies, it was necessary for Mike to attend in court on only one of those prosecutions, in connection with a robbery by a young American and two Canadian high school students. His contact with the courts is accordingly limited to that particular occurrence, which he understands to have been perpetrated largely on the initiative of the American youth, with the high school students being paid a nominal $10.00 for their efforts.

> MIKE: Well, I didn't like the routine there, the time they say these are good boys, they're doing real well in school. And it doesn't mean nothing, it doesn't matter how they rob the store, how they did it to me . . . I don't like it, because I was down, eh, his father, his mother, he know I was the guy he rob, they didn't come to me and say, oh, how are you or something. I think they were mad at me, too. I think if there was a guy, you know, thinks about it, he would ask me a few things—it have nothing to do with his father, you know, I thought they would have done something, but they go by me many times and look at me . . .
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> INTERVIEWER: Did you try to approach them at all?
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> MIKE: Why should I? But they should have in my opinion, you know, 'cause they should have said sorry to me what's happening, you know, because for me was a big thing, and I don't think they're good people. If you are in my position and they're good guys then you're not happy put them in for two or three years. If it was my kid did something, going to steal something, I'm going to tell the guy sorry.

Mike's comments with respect to the judicial process reveal one of its most notable shortcomings, namely, that the victim is isolated by a sense of his own irrelevance. It was Mike's impression that an inordinate amount of attention was devoted to concerns peculiar to the offenders, to the virtual exclusion of concerns relevant to the victim. The fact that the court was prepared to remand the matter for sentencing pending receipt of records of the boys' performance in school indicated to the victim that their school records were matters of some importance, to be taken into account in determining the appropriate sentence. By implication, however, no such importance was attributed to the emotional impact on the victim of a robbery with threats of violence, for no questions were directed to him which would indicate that this was a factor to be taken into account.

Mike's primary source of dissatisfaction with the judicial process appeared to be that the court did not seek and the defendants did not tender an unequivocal, visible and sincere acknowledgement of responsibility for the offence and its consequences. The fact that the parents were not prepared to tender the apology to which Mike felt entitled, and, indeed, their hostility toward him for invoking the criminal process against their sons, were construed as an abdication of responsibility on the part of the parents. It appeared largely this attitude which prompted Mike's occasional punitive

comments, for he was convinced that "good people" would feel compelled to apologize, in which event "if you're in my position and they're good guys, then you're not happy put them in for two or three years".

It is the same theme of personal responsibility that appears to account for Mike's attitudes to bail and parole. He felt that these procedures were roughly equivalent, both representing sanctions for a dilution of responsibility for criminal conduct, encouraging offenders to believe that their activities would be treated with less than appropriate severity. The victim also saw further signs of the court's inclination to reduce the level of responsibility in a judicial etiquette which required the equation of "first prosecution" with "first offence". His experience had demonstrated to his satisfaction that there was no correlation between prosecutions and offences, and it seemed to him as peculiar hypocrisy for the court to pretend otherwise in its sentencing ritual.

In balance, it appears clear that Mike was remarkably leniently disposed to the offenders, or in any event, to the two high school students, for he believed that their participation in the robbery came as a consequence of the initiative and persuasion of the American youth. It is also significant that he professed himself satisfied with a penalty of two years' imprisonment for the offence of armed robbery for the other, presumably more responsible, offenders prosecuted in connection with his milk store operation.

Implicit within Mike's distinction between offenders in terms of their responsibility and the penalties appropriate to that responsibility is an appreciation that considerations peculiar to the offenders are relevant for sentencing purposes. He did not feel, however, that these considerations were entitled to exclusive attention, and asked only that the terms of reference extend to his own concerns as a milk store operator with a high degree of occupational vulnerability to robbery.

Victim No. 3: Romeo

Offence: Breaking and Entering (commercial), April 10, 1972.

Interview date: May 9, 1973.

1. *The Offence*

The victims in this instance were a second-generation Italian couple who operated a fruit and vegetable store. During the course of the interview, it appeared that the wife tended to dominate the household. She appeared quite articulate, strongly opinionated and somewhat inclined to exaggeration. Her husband, on the other hand, lacked her language skills but accepted the substance of her observations, interrupting only when he felt that she had gone beyond the usual overstatement of her position. Their contact with criminal activity breaks down into three main categories: (1) break-ins and

petty thefts by delivery boys and local children at the family store; (2) vandalism and petty theft by neighbourhood children at the family residence; (3) break-ins at Mr. Romeo's parents' house.

They were interviewed primarily in connection with an April 10, 1972 break-in at their store—a break-in subsequently found to have been committed by one of their former delivery boys. The offender had not been in their employ at the time of the offence, but had been discharged several months earlier for marking up the amounts on C.O.D. order slips and pocketing the difference. The Romeos' store had not been singled out by reason of the offender's prior employment in the store; theirs was but one of fourteen businesses on the Danforth entered by the offender and his 5 companions. Entry was effected by breaking a rear window in the store, netting approximately $5.00 in loose change. The premises were not otherwise disturbed, although several of the other break-ins had been accompanied by a rather extensive amount of vandalism (the contents of lawyers' and dentists' filing cabinets being strewn about, etc.). The offenders were apprehended several months later with the only adult offender of the group (aged 16 years) pleading guilty to eight of 14 counts of breaking and entering and given a suspended sentence of two years.

Over the period of time the Romeos have operated the store (17 years), there have been a number of break-ins, together with a predictable amount of shoplifting and petty thefts by local children and delivery boys employed in the store. To the best of the Romeo's knowledge, offenders were apprehended on only one other occasion. In that instance one of their delivery boys and a companion broke into the store on three or four consecutive evenings and stole the loose change left on the premises overnight, amounting in total to approximately $40.00. They were apprehended when Mr. Romeo suspecting that someone in the store was responsible kept the store under surveillance after closing hours and observed the boys enter the store through an unlocked basement window. The police were then called to apprehend the offenders. Whether at the suggestion of the police or Mr. Romeo, arrangements were made to reimburse him for his losses. Only one of the boys in fact delivered his share of the compensation and the Romeos heard nothing thereafter about the boys' disposition at the hands of the police. It is perhaps of some interest to note, however, that the same delivery boy who had been apprehended for the theft contacted Mr. Romeo approximately six months later to inquire whether he was forgiven (he having been the only one to make restitution), and upon being told that he was, requested permission to work for them again as a delivery boy. Although he was advised that another boy had since been engaged and that there was accordingly no position open, it is clear that he would not under any circumstances have been re-hired.

As mentioned, Mr. and Mrs. Romeo have also to contend with shopliftings by neighbourhood children at the grocery store and minor acts of

vandalism and petty theft at the family home. There would appear to be some conflict of opinion between husband and wife as to the response appropriate to such offences. They both profess to be motivated by a desire firstly to regulate the child's conduct, almost in the manner of a parent, and secondly to protect themselves from further depredation by that particular child. The primary motivation in their response, in other words, is their concern for the interests of the child apprehended. They differ, however, on whether the police should be called to reinforce their warnings or cautions to the child. Thus, Mr. Romeo is inclined to caution the child, believing that little is to be gained by calling the police, and, moreover, that everyone is entitled to a second chance. His wife, on the other hand, is more likely to demand that the child go home and return with enough money to pay for the article stolen or damaged; if the child's age or demeanor suggests it, she will also phone the police, less with a view to invoking the criminal process against the child than to employing the authoritative stature of the police to impress upon the juveniles the potentially serious ramifications of their conduct.

> MRS. ROMEO: And as a matter of fact, I think this is another place where my husband and I would disagree. If he had been in the store [when his wife discovered the April 10, 1972 breaking & entering], ten to one he wouldn't have called the police. He would say, well, why bother? Fix the window and forget it, whereas I'm the opposite. I figure there just might be something and where he thinks that—let the kid off and give him a second chance, regardless of his age, I don't think that's right. I think they should at least be frightened so they'll think twice before—especially the younger kids. Now, maybe when they get to be sixteen, some of them are hardened criminals as far as I'm concerned. But youngsters, I really think that if you threaten to call the police—if you don't, if you give them a second chance—I think you should do what you threaten to a child.
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> MRS. ROMEO: At our store, if a kid six years old steals an apple, my husband says, why did you steal that apple? He'll go out and find them around the corner and he'll say, why did you steal that apple, as sweet as honey. And the kid'll say, well, I was hungry and I felt like eating it, and my husband'll say, well, don't you steal anymore because it's not right. Me, I'm hard. I say, look, you just get home and get ten cents and get it back here or, boy, you're in real trouble. In other words, I don't care if they ever bring it back, but I like them to think that this is what's going to happen, just all kinds of dire things. I figure the next time they pass, they'll be thinking, oh, I better not steal anything and it's a good lesson . . . I mean I wouldn't want to hurt little kids, but I don't think they learned anything at home, but I think they're going to learn something from me.
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> MRS. ROMEO: [When advised that the sentence given to the adult offender in the April 10, 1972 break-in had been one of eighteen months, suspended on pleading guilty to eight of fourteen counts]: What good is it going to do them anyway, even if they're in there a year or two

years? They're only going to get worse when they come out. I can't be hard on the kids, even if they do steal. I still say that there's lot of good in them somewhere down the line, if they're taught. Everyone is entitled to a mistake.

INTERVIEWER: What would have been an appropriate disposition in this case?

MR. ROMEO: I really don't know. Like I say, you're talking to the wrong man. I'm chicken-hearted, that's all.

INTERVIEWER: You can't be too chicken-hearted if, as your wife has suggested, you phoned the police when the boys were in your store, because you were afraid you might do them some harm [a reference to a previous break-in].

MR. ROMEO: Yes, I did phone the police that time, but the only reason I did that was to straighten out the boys, through his people. In other words, I had the same break. If my kids got into trouble, I wish their father would phone me and I would straighten it out for them. But I didn't lay no charge against them, not that I can remember . . .

INTERVIEWER: Were you asked whether you wanted to lay a charge?

MR. ROMEO: No, I just said that I want my money back.

INTERVIEWER: Did you indicate to the police that you weren't interested in laying a charge, or were you leaving it up to them to make that decision?

MR. ROMEO: No I was leaving it up to them to make their decision. As far as I was concerned, I just wanted their people to know, which I don't think their people did know about these boys. In other words, they were probably good kids just like this kid here [pointing to his own eleven year old boy]. He might be out another year from now stealing something and I won't know, but I wish someone would tell me, and I would get it all straightened out.

2. *Contact with the Criminal Process*

(a) *The police*

Because the criminal activity to which the Romeos had been exposed was notable primarily for its nuisance value, they felt more annoyed than threatened by the aftermath of criminal victimization. Their experience had demonstrated that their primary risks were neighbourhood youth and they were accordingly inclined to view their victimization as a product of inadequate parental control over the activities of their children—an inevitable consequence of the difficulties involved in raising children. As a result, their expectations of the police were largely defined by their usefulness in limiting the consequences of normal patterns of juvenile behaviour. The usefulness lay primarily in bringing the children's delinquencies to the attention of their parents, hoping thereby to contain the misconduct and, if possible, provide an opportunity for an agreement for restitution.

It is similarly within these expectations that the Romeos' principle sources of dissatisfaction were found.

MRS. ROMEO: It's the fact that I went to the trouble because I wanted these boys to be taught a lesson, not because I wanted them to go to Jail. I wanted them to know that they couldn't get away with this sort of

thing, that there are people that won't put up with it and there are laws to protect people who won't put up with it. And, I mean, I might as well have stayed in the house and said help yourself, you know. In other words, why go to the trouble of trying to protect anything unless you're going to be made aware of what's going on after the fact.

The Romeos were thus resentful that the police tended not to inform them of the outcome of their requests for police intervention—either to advise them of disposition proposed for the juveniles apprehended or, more important, to provide information to the complainants which would permit them to assess the propriety of the disposition proposed. They were, moreover, annoyed that the responsibility for changing decisions appeared to have been appropriated by the police, particularly because they believed themselves entitled to use the police to buttress their ultimatums to the offenders and their parents: pay for the item damaged or stolen or face the consequences of prosecution.

MRS. ROMEO: Nothing, nothing has ever happened with anything that I ever knew. That's what I'm trying to tell you. This is the only time that we have ever been called that they have ever been able to do anything that we knew of, or that they even caught the person. Except this Rocco, I knew that we knew who that was. But many times that store's been broken into, and the whole area, like, but I don't believe that they've ever let us know that they've ever caught anybody. I always thought they didn't catch anybody, and that's why they never ever called back, and I believe this now.

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MRS. ROMEO: [In connection with police assistance when young boy apprehended by Mrs. Romeo attempting to steal Christmas lights from family home] And when you go to the trouble—as I say you're taking quite a chance out there, chasing these guys. You don't know who they are or what they've got on them or how old they are or anything in the dark. And then the police come and they say the juvenile authorities will look after them, etc., etc., and the father comes, and he could care less, really and you don't even get a phone call so much as to say, well, I know who the four boys are, etc., etc., etc., and then—nothing, absolutely nothing and this really makes me mad, it really does. If I went to the trouble of informing them, why can't they go to the trouble of informing me. I asked the officer to have the children investigated and let me know what kind of children they were. In other words, I probably might have been able to do some good if one was fourteen years old, and the other kid was ten. Well, what's a ten year old doing out at 10:30 at night with a fourteen year old in the first place. And I mean, I'm no judge; I can't assume anything, eh. I don't want to, but I figure the least they could have done—I don't say they should have dropped all their big charges or what have you and rushed out and looked afted my little case, but I think eventually somebody should have gone and at least have advised their parents that they had been caught stealing the lights, and made their parents aware. I'd be furious if my kid did it and the police didn't tell me.

MRS. ROMEOS [When asked what it was that led her to believe that the police had not advised the parents in this particular case] Well, for one thing, why didn't I get the chance whether I wanted to press

charges against those boys or not? It was my privilege, wasn't it. I caught them. You mean to tell me I couldn't go down and put a charge of theft against those boys, and I was discouraged from doing that by the police officer. He said that it wouldn't be a case of that, which I knew he was wrong but I didn't care that much anyway. . . . You see, to me, the whole thing wasn't handled right. I think the police should have told him, if you don't want to have charges pressed against you of theft, you pay the money back and you've got so long to do it or [Mr. Romeo] signs that you're charged with theft. In other words, encourage my husband to have this boy charged with theft if he didn't pay the money back. Never mind the parents—these foreign people can cry and carry on like silly maniacs, but in the meantime—I don't say they don't feel things, but if they couldn't handle him, make the boy pay the money back. In other words, he has to get a job, and he has to pay it back systematically so much a week out of what he earns. And, to me, he would have learned something. But, to me, the way he was handled, he didn't learn anything, except that he, because he was young, he could get away with things.

INTERVIEWER: [Note that Rocco was apparently aged 15] Were charges laid?

MRS. ROMEO: Oh, I don't think they were. I'm perfectly convinced they weren't because he didn't plead guilty to it and if they would have laid charges, we would have had to go down and say, eh? I was never satisfied about that.

Despite these reservations about police performance, the Romeos expressed themselves to be generally in sympathy with the police and appreciative of the difficulties of law enforcement. Mrs. Romeo, in particular, felt compelled to remind herself of the need to distinguish the police from the laws and constraints within which they perform their responsibilities.

MRS. ROMEO: I figure, you know, I kind of take my spite, we'll say, out on the police, but actually if you even carried it back—like say, this boy, he was caught going into fourteen places and convicted on eight and he ends up walking free, and it didn't cost him anything. What did he actually give up? A little bit of embarrassment by being caught. So, if, you say, well, there's something wrong. I don't really blame the police, but you have a tendency to say in your mind, like, what's the use, like my husband does, don't bother with it, it isn't worth it. But that's the law, really, isn't it? You've got to separate the law from the police, but you don't; you just don't stop and think. That's what my husband feels, why bother calling the police because the kid's not—whoever it is is going to get away with it anyways, why go to all this trouble, and he would think, the police don't do anything, but that's what I'm saying. It probably isn't the police, it's the law as such, the way it's written. It isn't really their fault.

(b) *The courts*

Because, with one or two exceptions, no request for police intervention has culminated in prosecution, and because the prosecutions that did occur were conducted exclusively on police initiative, the Romeos have had no direct experience with the courts. It did not appear, however, that it was this lack of direct contact which accounted for their reluctance to comment

on the propriety of the sentence given to the sixteen-year old youth apprehended for the April 10, 1972 break-in (eighteen months suspended sentence on pleading guilty to eight of fourteen break-ins, with the balance withdrawn at the request of the Crown, the Romeos had not been advised of the outcome and received this information for the first time during the course of the interview). After several attempts to elicit a response to the disposition, it emerged that their reticence derived from the same source as their criticism of the police, namely, that they had not been permitted access to information which would have enabled them to make an informed judgement.

MRS. ROMEO: [In response to question as to what would have been an appropriate punishment for a 16 year old youth involved in a systematic series of fourteen break-ins of commercial concerns in the area, with varying amounts of apparently malicious damage in the businesses entered] Well, like I say, I think it depends—this is what I don't understand. I think that the victim should be made aware of the circumstances, without frills, of the people. In other words, if somebody robbed me, I wouldn't care if it was a hundred dollars, two dollars or what it was, if that kid's mother was having an operation, and he didn't have the money, and the father was dead, I think this warrants special attention, but if the parents have had trouble with him and they have been really working hard, trying to bring this kid up right, and this and that and the other, and the parents say, well, I've had it, there's nothing I can do to help this boy anymore, he won't listen. Now, I think if the victim knew that, they would press charges enough so maybe that boy would go to jail. But there again, you see, maybe if he goes to jail he'll learn more than he knew before he ever went there. I don't know. So maybe this is why the law is written like it is, hoping that if they put on a suspended sentence, this boy here, Raethorn or whatever his name is, he won't have met all these other types and therefore he's better off. I don't know. Is that the reason they do it?

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MRS. ROMEO: I think if you investigated all kinds of this, you'd find that the victim never knows what happened to the people involved, unless it was a case of manslaughter or something where there's going to be a trial by judge and jury, and what have you, and it's in the papers. But we're really not talking about that, we're talking about small offences, aren't we? I know my ideas would definitely alter in different cases. I know they would, depending on the circumstances, and this is it: you never get a chance to weigh anything yourself, you can't just say, well, I want to press charges, or I don't. You don't really know what to do because you are never advised about the circumstances.

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MR. ROMEO: [When advised that the sentence received by Raethorn had been one of 18 months, suspended, on pleading guilty to eight of fourteen offences] What good is it going to do them anyway, even if they're in they're in there a year or two years. They're only going to get worse when they come out. I can't be hard on the kids, even if they do steal, I still say that there's a lot of good in them some-

where down the line, if they're taught. Everyone is entitled to a mistake. But these chaps have had two or three mistakes, haven't they?

INTERVIEWER: What would have been an appropriate disposition in this case?

MR. ROMEO: I really don't know. Like I say, you're talking to the wrong man. I'm chicken-hearted, that's all.

In this instance, the Romeos' direct experience led them to perceive the "typical" crime as one involving neighbourhood children or delivery boys employed at the store. Accordingly, theirs was not a punitive or retributive attitude to delinquency and the consequences appropriate to it. Rather, they saw such activity more as a problem to be managed by the combined efforts of parents, police *and* victims. They appeared to appreciate that theirs was necessarily a continuing vulnerability, for depredation by neighbourhood children and employees was an ineradicable feature of their residential and occupational environment.

It is interesting to compare these attitudes to those elicited from Mrs. Romeo in connection with her attendance as a witness at a manslaughter trial (having previously, at the request of the police, identified the body of her cousin, killed by her common-law husband of five years during the last of a series of drunken assaults). Apart from the repertoire of anecdotes Mrs. Romeo derived from the trial (e.g., witnesses, despite injunctions to the contrary, pooling their evidence in the isolation of the witness room), the experience also offers insights into the attitudes to more serious crimes, and more importantly, to crimes in which she is not herself directly involved but can see herself as a symbolic victim.

Although Mrs. Romeo knew her cousin only vaguely and, indeed, was anxious to dissociate herself from her because of her "poor reputation", she believed the death to have been the almost inevitable result of a series of brutal assaults over the history of the relationship. When the offender was convicted and sentenced to ten years imprisonment, Mrs. Romeo felt satisfied that he had been appropriately punished. She was upset, however, that this sentence might possibly be mitigated by parole, believing that this particular offender was manifestly not entitled to such relief because of his demonstrated propensity for violent assaults. On the other hand, she was quick to explain that if she herself were killed by her husband in an atypical fit of rage, it would be most unfair if he were to be given an equivalent penalty.

MRS. ROMEO: [When asked what she thought about parole as such] I think maybe in a lot of cases it's good, but if I can bring this out—if my husband and I, all of a sudden, he came home drunk—he doesn't even drink. But if he came home drunk—he's never abused me, I've lived with him for years, and he come home drunk and he beat me up for some unknown reasons, but something he got in his stupid head this one particular time, and he had to get even, and he had no intention of killing me but he was trying to get even and he whacked me all over the place, and I died as a result of it. To me,

> he should not get the same treatment—if he even went to jail it would be terrible because he didn't mean to kill me and he wasn't over a period of time beating me and abusing me. It was a one-shot effort, he went crazy one night and lost his head, sort of thing. He shouldn't be punished the same way as someone who, over a period of time, was doing the same thing repeatedly, repeatedly, the police are called all the time, and bothered all the time, and the neighbours are bothered all the time. This to me is different than somebody who does one thing once in a fit of temper or a fit of jealousy or a fit of anything. I can understand. I think anybody can lose control at one time if their circumstances are just the way they are. This is what I was saying about kids. You can't treat everything the same. Everything's got to be treated on its own. And this man to me didn't get enough [because he will be out on parole in 3¼ years].

Her distinction between the two cases is significant for two reasons: (1) it reaffirms her previous indications that the severity of the sentence should depend as much, if not more, on the offender as on his offence; and (2) it suggests that if opportunities were made available for relaying to the victim an expanded appreciation of the offender's characteristics, victims (both real and symbolic) would be less punitively-inclined than conventional wisdom might suggest.

Conflict and the Uses of Adjudication

Prepared by

Calvin Becker

1. *The Adjudicative Ideal*

Primitive dispute resolution involved at least two processes, reciprocal accommodation through customary law[1] and reciprocal attempts at determination through force. Although contemporary conflict resolution involves the same basic elements, the processes of resolution have been formalized: a large part of the customary law has been transformed into legislation and regulation, and the state has acquired a monopoly of authority over the exercise of force. The appropriation from the original actors, their kin and kadis[2], of the jurisdiction to regulate conflict resolution entailed the development of mechanisms for participant involvement suited to the reality of the new locus of ultimate authority.

One such development (and the one with which we are here principally concerned) was that of adjudication. Fuller described the emergence of adjudication as one of the features of the transition from "a condition of anarchy to despotism toward something deserving the name of the rule of law."[3] Ideally, adjudication is described as a mechanism which accords to members of the community a formal opportunity for participation in their social ordering.[4] It provides an institutionally guaranteed construct of procedures through which a party may participate in determinations which affect his interests by presenting proofs and arguments to an impartial arbiter for a decision in his favor.

The obligation of impartiality dictates that the arbiter be so located in institutional terms that his position will not be affected by the outcome of individual cases. In his efforts to effect a determination of the disputes presented to him, he is obliged to be independent both of the need for direct alliance with one or the other of the disputants and of the opportunity to enhance his own social position by his determination. Only thus is it possible to immunize the arbiter from the need for partisan alliances and the compromising effect such alliances would have upon his unique moral position. The arbiter is accordingly required to be detached, morally, emotionally, and financially from the matrix of the dispute if his decision is to be accepted as conclusive.

The essence of adjudication, however, resides less in the office of the arbiter or judge than in the procedures by which the participants are guaranteed an opportunity to affect the outcome. The adjudicative mechanism is predominantly characterized by the procedural restraints imposed on the arbiter, obliging him to be both passive and impartial. Thus, the proofs and arguments must be presented to him by the participants or their representatives: he is not to seek them out on his own initiative. As a consequence, an

adversarial component becomes an integral feature of the machinery of adjudication, for if the arbiter is to be restrained from initiating investigations into disputes, some alternative technique must be introduced to perform that function.

The constitution of the adjudicative mechanism, with its requirement that the arbiter be professionally detached from the problem and its outcome and that the issue be presented within a construct of adversarial procedures, predicates an inherent institutional need for conflict maintenance.[5] The adjudicative system is structured to employ the conflict which inheres in a given problem unit, channelling it through an adversarial framework in the expectation that it will act to define the issues into a formula amenable to the application of adjudicative solutions. Because the mechanism is designed to exploit only the conflict factor, the relatively greater emphasis on discord tends to submerge any corresponding potential for harmony which might subsist in the problem presented for assessment. The parties are thus encouraged to present their proofs and arguments as forcefully as possible, and because it is procedurally irrelevant, to ignore the potential for accommodation.

The virtue of the adversarial component is that it operates to polarize the disputants' positions and thereby facilitates identification of the issues or conflict factors in a form suitable for adjudicative solutions. Its deficiency, however, is that its structural dependency on conflict maintenance, albeit necessary to reformulate the problem for adjudicative purposes, converts the problem unit into one which is defined exclusively in terms of conflict.

It is in large part this need to redefine problems in terms of their contribution to the conflict ethic which makes adjudication an inadequate medium for resolution of the types of conflict peculiar to pre-existing relationships.

Where the association which precedes the conflict is casual, brief, or otherwise of relatively uncomplicated proportions—or, indeed, where the conflict itself constitutes and circumscribes the prior association—adjudication represents an appropriate mechanism for conflict resolution. In most such instances there will be no substantial differential in perceptions of the problem between litigants and arbiter when it is submitted to redefinition in terms of its contribution to the conflict ethic. An interaction between strangers, as for example, an assault committed by an offender with no prior connection to the victim, in which the conflict or assault represents the extent of the association, presents an ideal opportunity for adjudication. The event is amenable to definition exclusively in terms of conflict and the normative criteria available to the adjudicative apparatus can be applied directly to a factual base mutually perceived by actors and arbiter alike. The adjudicative mechanism is in fact best equipped for the social task of assessing the propriety of conduct on an impersonal, act-oriented basis.[6] It is acts, not

persons or their relationships to one another, that are declared proper or improper under the relevant provisions of the law.

Where, however, the conflict is in fact generated by a prior association with a history of psychological, emotional and legal nexus between the participants, such problems are not easily accommodated to resolution through adjudication. An assault committed by a husband upon a wife, for example, may provide an opportunity for adjudicative intervention, but the mechanism is designed to interpret only the conflict and accordingly cannot locate the assault in any meaningful way in the context of the relationship—a relationship characterized by an intricate and reciprocating balance of psychological, emotional and legal connections. The same structural characteristics which equip adjudication for determinations as to the propriety of conduct on an impersonal, act-oriented basis limit, if not preclude, its utility for relationship-oriented social ordering.

The adjudicative structures are not designed, in other words, for the resolution of what Fuller has termed "polycentric" problems, i.e., problems in which the constituent elements are so related as to be reciprocally interacting, with a determination of one facet of the problem reordering the balance and alignment of the others.[7] Continuing relationships tend to generate polycentric or multi-dimensional problems; and, indeed, such conflict is as much a characteristic of relationships as harmony, for it is the shifting ratio of one to the other which defines the relationship.[8]

Although the assaults mentioned in the preceding examples, one between strangers and the other between husband and wife, are sufficiently similar to permit an adjudicative intervention, they are so markedly different in terms of their sources that only the former will permit an adjudicative resolution. Different sources of conflict may require a different type of mechanism for their resolution. As the source of conflict moves from a context of casual, brief or otherwise uncomplicated associations to a context of bilateral monopoly relationships, the contribution of adjudication to conflict resolution becomes correspondingly less productive.

2. *Conflict Abstraction in the Criminal Process*

Adjudication is presently the only forum recognized as legitimate for resolution of conflict which permits of a criminal definition, whether the occurrence represents an armed robbery involving a victim and offender who are essentially strangers or a common assault between husband and wife. On a more generalized level, the adjudicative forum is made to serve as a mechanism for conflict resolution both in cases where the event constitutes and defines the relationship, i.e. criminal events involving strangers, and where the relationship generates the criminal event, an event grounded in and representing but one facet of that prior relationship.

Because the criminal process has extended to adjudication a virtually exclusive franchise for resolution of criminally-defined conflict, it becomes necessary to examine in some detail the processes by which the conflict potential is abstracted from a given problem unit and used to reformulate the problem into one amenable to the application of adjudicative solutions. This process of abstraction is central to an understanding of the role of conflict maintenance in the adjudicative mechanism.

(1) *Conflicts of Interests*

To assist in this understanding, it is helpful to employ Aubert's conceptual distinction between conflicts of interests and conflicts of values or beliefs.[9] The problems presented for adjudication may thus be characterized in either of two ways, depending upon the base of the conflict. In this context, conflict *per se* simply refers to a state of tension between two actors irrespective of its origins and the routes followed for its termination.

Conflict grounded upon competing interests may be said to derive from a situation of scarcity of power, authority or commodities: both actors seek a common value or commodity, the availability or supply of which is limited.[10] This type of conflict is perhaps best illustrated by the operation of the market economy, with the vendor anxious to command the best price possible for his goods and the purchaser anxious to acquire the goods as cheaply as possible. It is in the mutual interests of both parties that the conflict potential in such situations not be realized and that an agreement be reached through concessions in their respective positions. The agreement, however, will not derive from an adjustment of their ethical commitments to the price of the commodity, but rather from a shared interest in minimizing the likelihood of maximal loss on both sides. For the purchaser to decline to buy or the vendor to sell would represent an undesirable outcome from the point of view of both parties. They will therefore be prepared to negotiate a compromise in accordance with their respective preferences and interests under the given market conditions.

The significant characteristic of conflicts of interests is thus that they are soluble without resort to normative criteria. There need not, in other words, be an expansion of the conflict into competing moral or ethical commitments because there is a consensus on the intrinsic value of the object of the transaction. Each party to the transaction is encouraged to operate within his own value system according to his perception of his interests and to avoid conceptualizing his position in normative or ethical terms. A successful outcome in a situation of conflicting interests is thus not assessed in strictly competitive terms: it is not winning relative to one's adversary, but rather gaining relative to one's own value system.[11] Consequently, except in cases of pure conflict,[12] there will always be a possibility for resolution of the competing interests by negotiation, by accommodation, or by avoidance of mutually

damaging behaviour because the interests of the parties are not mutually exclusive.

It is this duality of harmony and discord, of common and competing interests, which creates the possibility of avoiding a mutually damaging outcome. The shifting ratio of consensus over the intrinsic value of the object and conflict over its cost or availability provides an opportunity for conducting the transaction in a way which minimizes damage. As Schelling observed, "Mutual dependence is part of the logical structure [of the conflict of interest situation] and demands some form of collaboration or mutual accommodation—tacit, if not explicit—even if only in the avoidance of mutual disaster."[13] The potential for accommodation is thus as important a dynamic as the element of conflict. It is for this reason that mechanisms which permit accommodation or negotiation are appropriate for resolution of disputes grounded in a conflict of interests.

(2) *Dissensus*

Competing interests do not necessarily entail any disagreement concerning facts or values. Indeed, as previously indicated, a conflict of interests predicates a consensus, at least on the intrinsic worth of the object of the competition. Although the area of consensus may be closely circumscribed, the fact that it subsists at all in any interest conflict is significant, for it provides the dynamic or motivating incentive for effecting a mutually satisfactory outcome through negotiation.

A conflict of values, on the other hand, is based upon a dissensus concerning the normative status or propriety of a social object or event, and is accordingly both more fundamental and less amenable to resolution through negotiation. Although the ideology of the market place discourages tendencies to interpret conflict as a matter of principle, guilt or responsibility, conflicts of interest in other contexts may evolve into a dissensus over values or dissensus over facts or both. This reformulation of the conflict will occur when the antagonists connect their interests with a system of ethical or moral precedents which is external to and transcends the value systems peculiar to the individual antagonists. When the conflict of interests is transformed into a dissensus over values, the conflict becomes more difficult to resolve by negotiation because the issue becomes one of individual responsibility with reference to an external value system. At the same time, however, this transformation from conflict to dissensus may open the dispute up to resolution through mediums other than negotiation. "To put it very simply: As long as a conflict of interest remains relatively pure [value-free, in this context], it is amenable to solutions through bargaining and compromise, on the condition that there is something to give and something to take on both sides. . . . When a clash of interests has become associated with a dissensus, bargaining and compromise may be harder to achieve, while the conflict has, on the other

hand, become amenable to a solution through the intervention of law in the broadest sense."[14]

Aubert went on to suggest that the transformation from conflict to dissensus could occur in two ways, either spontaneously, as an inevitable consequence of the escalation of the conflict, or alternatively, as a consequence of the structure of the conflict-solving mechanism.[15] If conflicts progress toward a solution, they may do so in one of two major ways: through bargaining and compromise, or through law and the application of norms to established facts. In a sense, the former conflict-solving mechanism presupposes that the conflict is handled as a conflict of interest, while the latter presupposes that it be handled as a dissensus over facts or norms, although the underlying opposition of interests may be fully recognized. Thus, there is a correspondence between the two sources of conflict and the two mechanisms for solution. This is not to say that the source of the conflict will fully determine the mechanism of solution, but it can be suggested that conflicts may be transformed when they pass from the stage of aggravation to the stage of solution, and this may often be dependent upon the availability and effectiveness of the existing apparatus for conflict resolution. If, as in the criminal context, the only mechanism is that of adjudication, a conflict of interest must necessarily be reformulated as a dissensus, a conflict of value or belief. It may well be that this transformation will have already occurred spontaneously, prior to the intervention of the adjudicative apparatus, thus making it insoluble through compromise. If the transformation has not already occurred, however, it must be effected before the parties can engage in effective litigation. In this sense, therefore, when a conflict of interest is presented for adjudication, the adversaries will be forced by the conflict-solving mechanism to formulate their opposing interests as a dissensus over facts or law or both.

3. *Adjudicative Structures and Normative Solutions*

Adjudication, as a mechanism for conflict resolution, is structurally equipped only for the application of normative solutions. The apparatus must necessarily function by producing normative conclusions on an impersonal, act-oriented basis. It is not designed to assess conflict in a causal-functional matrix and then proceed to resolve that conflict by removing the cause of the dissension, as, for example, a physician is able to identify the source or cause of disease and proceed to eliminate the malignancy. When the arbiter is recruited to impose order on a conflict of interest situation, he can of course identify the source of the conflict as being the limited availability of the object of the competition. The observation that the source of the conflict derives from a condition of scarcity of goods, power or authority, however, does not imply the solution for this scarcity makes for a certain immutability in the causes of interpersonal conflict. It is not within the power of the arbiter

to extend the availability of the sought-after commodity and he must therefore make a determination as to its distribution. He will accordingly be forced to abandon a process of determination which equates causes directly with solutions; that is, he must abandon attempts to remove the causes of conflict and search for a process which will permit him to make a determination as to the way in which the scarce commodity is to be distributed. This determination will thus involve a search for indices of entitlement which in turn entails a reconceptualization of the conflict according to the norms of distributive justice. For the arbiter to observe, for example, that both parties are competing for an object of limited availability and that one or the other of the parties has more of that limited commodity than his needs require is to arrive at a normative conclusion that that party is too greedy, too selfish or whatever. Whenever the arbiter looks for causes of interpersonal conflict he is likely to find acts which imply responsibility and lie open to evaluation in normative terms. The search for an adjudicative solution will therefore necessarily imply reference to a normative structure; accordingly, if the conflict has not been reconceptualized prior to its presentation to the adjudicative apparatus, this transformation must be effected to make the problem eligible for the application of normative solutions.

When a conflict of interests is tendered for adjudication, therefore, the conflict potential must be abstracted and transformed into a dissensus in order to accommodate the problem to the problem-solving mechanism—a mechanism designed to arrive at solutions only through manipulation or ordering on a normative, act-oriented basis. The consequence is that a clash of interests will thereafter be formulated as a disagreement concerning either certain facts in the past or concerning what norms to apply to the existing state of affairs, or both. Whether the solution harmonizes two contrasting sets of needs and plans for the future is no longer material. The problem has been objectivized and a solution can now be reached by an outsider who knows the rules of evidence and is able to perform logical manipulations within a normative structure. By comparing the available facts with the normative precedents, he can arrive at a verdict.

4. *Norm Definition and the Responsibilities of Social Control*

As indicated previously, the adjudicative apparatus is ideally characterized by (1) a construct of adversial procedures designed to redefine the issues into a formula amenable to adjudicative solutions, and (2) an impartial arbiter whose social position is independent of the outcome of any given determination. This second feature is designed to preclude the possibility of the arbiter making normative alliances with either of the participants, for to do so would jeopardize his status as an impartial third party. His unique moral position would be compromised if, although his interests differ from those of the disputants, he were in normative terms to become one in a subgroup

of two. The need for an institutional guarantee of impartiality therefore implicitly dictates that the normative structure be external to the private value systems of the individual litigants. In the criminal context this latter requirement is of course fulfilled by the criminal law, which provides a definitive value system with reference to which the arbiter can assign legal responsibility for conflict.

The deference to an external normative system, while necessary to protect the institutional status impartiality, also means that criminal adjudication will have something of a bifurcated responsibility; it has a responsibility to criminal litigants to operate as a forum for conflict resolution and a responsibility to itself as a social institution to maintain the primacy of its normative structures. In the course of fulfilling this latter responsibility, the function of conflict resolution is subordinated to the social task of maintaining conformity with the law.[16]

The responsibility to serve as a vehicle for norm definition and social control disposes the adjudicative apparatus to become differentiated from its explicit function as posited by Fuller, that of providing an opportunity for participation to those affected by social decisions. With the subordination of the function of conflict resolution comes a corresponding potential for subordination of the interests of the original participants. The extension of the universe of considerations to incorporate the institutional needs of the intervenor makes it a virtual certainty that the interests of the immediate litigants will be superceded by those of the intervenor,[17] at least to the extent that they are inconsistent with the intervenor's interests in maintaining the supremacy of its value system. The institutional premise appears to be that the public interest resides exclusively in maintaining conformity with the law —a premise which precludes the possibility that the public interest might be better served if, at least in the first instance, the participants were to be given an opportunity to arrive at an outcome within their own terms of relevance. In the result, not only must the disputants and their problem be defined in terms of a contribution to the conflict ethic, but that contribution will be determined by reference to considerations external to the conflict itself, namely, the responsibility vested in the adjudicative mechanism for the demonstration and reenforcement of societal norms.

It is at this point that criminal adjudication comes to resemble the so-called zero-sum game.[18] The original problem unit, whether a conflict of interests or a conflict of particularistic values, has been transformed into a normative dissensus. The value system within which responsibility is to be allocated, however, must necessarily be external to that of the disputants in order to protect the arbiter from the need for partisan alliances and thereby to assure his impartiality. The institutional pressures to maintain the hegemony of its value system immunize the normative structures to reshaping through efforts at negotiation or compromise by the antagonists. When the parties are

polarized into normative positions vis-à-vis an external, inflexible reference point, the potential for compromise is eliminated from the logical structure and assigned to the realm of the legally and procedurally irrelevant. When there is no scope for mutual accommodation, no common interest even in avoiding mutual disaster, the interests of the parties cease to be reciprocally dependent; indeed, they have been rendered mutually exclusive. Gains are thus no longer secured relative to one's own value system, but rather relative to a fixed, external value structure. A gain by one party is accordingly a direct loss to his opponent and the interaction qualifies as a zero-sum game.

This is not to suggest that zero-sum games have no place in the process of conflict resolution. Where the conflict derives from and constitutes the extent of the nexus—legal, moral, ethical and psychic—between the actors, the adjudicative process of conflict abstraction will produce a relatively consistent perception of the interaction, common to all participants, complainant, defendant and intervenor alike. In most such situations, the victim's sole interest lies in having a value recognized or restored to him, whether his physical integrity or property. The offender may either acknowledge or deny the claim, but in either event will do so within the same or equivalent terms of relevance. In other words, adjudication is perfectly suited to the resolution or determination of conflict between strangers. Where, however, the conflict derives from and represents but one facet of a continuing association, this process of abstraction creates a substantial differential in perceptions of the interaction as between complainant, defendant and intervenor. Here, the structural dependency on conflict maintenance and abstraction to create a problem amenable to normative, zero-sum solution operates to objectivize the relationship, to submerge the potential for harmony, to make reciprocity and interdependence irrelevant, and to render the parties professional strangers.

5. *Victims and Offenders: Normative Careers in the Criminal Process*

To this point, it has been suggested that problems tendered for adjudication must first be subjected to a process of abstraction to accommodate the problem to the problem-solving mechanism. This process of abstraction operates initially to exploit the conflict potential in the problem unit and secondly to reformulate conflicts of interests or conflicts of facts or values (if the transformation should occur spontaneously prior to the adjudicative intervention) into a normative dissensus with reference to a relatively fixed and necessarily external value system. The institutional pressures to maintain the integrity of its normative structures, however, create a potential for subordination of the interests of the litigants in resolution of their dispute to the larger social interests of the adjudicative mechanism itself. As a consequence, the litigants and their interests will be redefined in terms consistent with their representative utility for fulfilling the institutional responsibilities of demonstration and re-enforcement of societal norms.

(1) *The Normative Career of the Victim*

A redefinition of the complainant or victim is thus effected by recognizing and supporting only those of his interests which are consistent with the value system administered by the adjudicative apparatus. This differential recognition of interests was an historical consequence of the evolution of the concept of crime. Whereas crime had previously been understood as a violation of the victim's interests, it came to be interpreted as a social disturbance and a threat to the state interest in maintaining order.[19] With the institutionalization of the processes of conflict resolution, the victim was correspondingly relieved of both the responsibility and the right to seek redress through his own initiatives, whether by accommodation through customary law or by attempts at determination through force. As the responsibility for criminal justice was appropriated by the state, the victim was deprived of the power to decide the penal consequences of crime. In the course of the transfer of responsibility for redress from victim to state, certain of the victim's interests were accorded formal recognition; in effect, to the extent that they were recognized as consistent with those of the state in preserving public order, etc., the victim's interests were assimilated by the state. There was, in other words, a declaration of symmetry between certain of the victim's interests and those of the state. Other of the victim's interests, lacking formal recognition, were either lost or relegated to other forums for redress.

Thus, for example, there will be support for the victim's interest in having a value recognized or restored to him, whether the physical integrity of his person or his property. Recognition will not be accorded, however, to the victim's interest in renegotiation of his position relative to the offender in the context of a continuing association. The process of abstraction cannot countenance the possibility that the victim might attach a greater value to a determination which provides for some measure of continuing reciprocity or interdependence with the offender.

Moreover, to recognize and support only the victim's interest in his physical integrity is necessarily to ignore his share of the responsibility for precipitating the criminal event. That is, for the victim to be redefined in terms of his representative capacity for demonstration of the value of physical integrity is to ignore those factors which imply some measure of responsibility to the victim for precipitating the event. Issues of reciprocal responsibility must necessarily be excluded from the adjudicative process because such issues do not permit an unequivocal normative reformulation. Only those factors which make a specific and unambiguous contribution to the zero-sum format of the adjudicative process will be permitted entry to the frame of relevance.[20]

The institutional capacity to abstract only those factors which permit redefinition within a zero-sum medium precludes any inquiry into issues

of functional responsibility. Thus, rather than viewing the criminal event as a potentially complex set of interactions involving victim, offender, police and, indeed, the adjudicative apparatus itself, a one-dimensional matrix is imposed on the event: those factors which do not militate unequivocally for the values residing in the normative structures will be blurred or otherwise ignored. The limitations inherent in the structure of the adjudicative mechanism preclude an integrated view of the role of the victim, both in terms of compensation and of recognition of his functional responsibility for the event. The victim has in effect been relieved of responsibility for seeking redress through his own initiatives and, concurrently, of responsibility for his contribution to the criminal event. In the result, the victim becomes a normative and evidentiary vehicle for the demonstration and re-enforcement of societal norms. His role in generating the conflict is ignored because of its resistance to one-dimensional, normative reformulation in the allocation of responsibility; his role in the process of adjudication is restricted except to the extent that he can provide an evidentiary base for assessing the gravity of the offence.

(2) *The Normative Career of the Offender*

Similarly, the other principal in the criminal event, the offender, undergoes a form of redefinition to equip him for his normative career. The structural needs of the adjudicative apparatus to limit the dissensus to some manageable proportions require that the offender's role be assessed within a universe of legal relevance which confines the inquiry to the last link in the chain of events. Those traits which characterize the offender in the immediate context of the criminal event are thus extracted and proclaimed as representative of the whole. The offender is redefined in event-specific terms and thus rendered eligible for an unequivocal allocation of legal responsibility. By locating responsibility with the offender, he is ascribed a legal status which permits his exploitation as a normative vehicle for emphasizing and compelling conformity with the law.

There will normally be a close conjunction of legal and functional responsibility in those criminal events which occur between strangers. The perceptions, legal and functional, which emerge from such events will for the most part be symmetrical as between victim, offender and arbiter. Where, however, the event is itself the product of an escalation of conflict in the context of a continuing association, there must necessarily be a certain disjunctiveness between the arbiter's assignment of legal responsibility and the litigants' perception of functional responsibility.

The allocation of exclusive legal responsibility to an offender who may feel entitled to share causal/functional responsibility with his victim cannot but operate as an impediment to the realignment of that relationship. The

asymmetrical perceptions of responsibility produced by the adjudicative process confer upon the victim a form of licence to ignore his contribution to the criminal event and create the appearance of a normative alliance between victim and arbiter. It is of course a rather limited alliance, as support is extended only to those of the victim's interests which qualify him for his own normative career in the criminal process. The effect is nevertheless to range against the offender both the victim and the monopoly of legitimate force represented by the arbiter. This alignment of forces around an objectivized conflict between professional strangers evokes a corresponding entrenchment and resistance on the part of the offender to acknowledge his responsibility to the victim.

In the result, both victim and offender are redefined in a plane coextensive with the interests of the adjudicative apparatus in securing conformity with its normative structures. To the extent that the interests of the litigants in obtaining a resolution of their conflict are inconsistent with those of the conflict-resolving mechanism, adjudication is inadequate as a medium for participation by those affected by the processes of social decision. It would appear, in other words, that adjudication, as a forum for conflict resolution, is of maximal utility only where there is a symmetry of interests between victim and offender in resolution of their conflict on the one hand, and the adjudicative apparatus in maintaining the primacy of its value system on the other.[21]

6. *Adjudication in the Criminal Process: Ideal and Reality*

The discussion to this point has been premised on the assumption that the criminal process is defined by adjudication. The image conveyed was one in which the parties and their representatives were ranged aggressively against each other, directing the conflict through a construct of adversarial procedures toward a definitive win/loss outcome in a forum designed for zero-sum determinations. Because of the need to impose manageable dimensions on the conflict and to accommodate the problem to the normative options available to the adjudicative mechanism, the conflict zone was necessarily confined to a dissensus over facts or values in the immediate context of the criminal event. These limitations on the frame of relevance created an opportunity for the victim and offender to acquire two divergent and asymmetrical sets of perceptions with respect to their relative responsibilities, legal and functional, for precipitating the criminal event. This differential in perceptions derived from the phenomenon of subordination: the pressures on the adjudicative apparatus to maintain the primacy of its value system tended to subordinate the immediate interests of the litigants in obtaining a resolution of their specific conflict, and to propel the litigants themselves into normative careers. Unless the victim and offender were strangers, however, their normative careers were inclined to be out of phase with their perceptions of

functional responsibility. Moreover, their disjunctiveness was further amplified as their perceptions of responsibility merged with the arbiter's interpretation of legal responsibility. The victim's contribution to the criminal event became legally irrelevant and the offender's became that which could be proved against him. Such career-oriented perceptions of responsibility could not but limit the process' educative potential, particularly with respect to that conflict in which the need was for a reshaping of personal relationships.

In reality, however, adjudication does not define the criminal process. It is instead a system of pre-trial negotiation in which the overwhelming majority of cases are terminated by a plea of guilty.[22] As a consequence, neither issues of functional responsibility, nor, indeed, of legal responsibility are submitted to scrutiny through the application of adversarial procedures. Rather, the recruiting of litigants for normative careers is generally a cooperative enterprise of the professional adversaries, counsel for the crown and counsel for the accused. It is they who negotiate careers for their respective "clients", victim and offender, and present their compromises to the arbiter for formal ratification and imposition of sanctions.[23] Reference to the adjudicative forum often indicates a failure at compromise by the parties to the dispute, particularly if that dispute has been generated from a pre-existing relationship between victim and offender. That such conflict should engage the full range of the adjudicative apparatus by trial, however, generally indicates a failure at compromise by their professional representatives. While the low-visibility of such negotiations precludes precise assessment, it is perhaps a fair statement that virtually all guilty pleas are a product of negotiation, either between police and accused or, where the accused is represented by counsel, between crown and defence: in exchange for forfeiting the option of trial, the accused is granted a reduction of charges or a neutralization of aggravating circumstances.[24]

That the preponderance of occurrences destined for adjudication should conclude by a negotiated plea of guilty, however, does not imply that the conflicit unit has finally succumbed to a resolution through accommodation. Rather, the anomaly is presented of a conflict which has proved intransigently resistent to resolution arriving at the adjudicative forum—a conflict resolution mechanism which structurally precludes accommodation—where a compromise is imposed on it, often by the very actors charged with responsibility for employing the adversary procedures. The adjudicative forum, theoretically incompatible with negotiation, is converted by operational concerns into a forum of justice by negotiation. The cooperation induced, however, is not between victim and offender, but rather between crown and defence in accordance with interests which may be largely independent of the victim and offender.

If the litigants could be said to control their roles in the process, the adjudicative ideal would resemble the zero-sum game. In fact, however, that

control resides with the professional adversaries, with the consequence that the reality of the adjudicative forum more closely resembles the mixed-motive than the zero-sum game.[25] The professional adversaries appropriate the responsibilities for conduct of the litigation, becoming themselves the major protagonists and producing a conflict unit in which the "goals of the players are partially coincident and partially in conflict."[26] Thus, although the adjudicative mechanism is predicated upon an ethic of genuine conflict, there are pressures to negotiate, to accommodate, to cooperate—pressures which derive from needs peculiar to the professional adversaries and their own bilateral relationship. There is, in other words, a factor of inter-dependence built into the logical structure of the relationship between the professional litigants.

The reciprocity between crown and defence is chiefly a product of two characteristics of the prosecutor's role, his quasi-magisterial function and his administrative responsibilities for expediting the work-load of the court.[27] The prosecutor performs a quasi-magisterial function in the sense that he is the last administrative check on police charging decisions and must accordingly assess the propriety of consigning particular cases from the police to the judicial sector. In institutional terms, he is located at the juncture between the operation of the presumption of administrative regularity and the presumption of innocence. It is thus his responsibility to ratify or reject the prior workings of the principle of administrative regularity by which the case was identified as eligible for processing in the judicial sector. To maintain the authority requisite to command this unique position vis-à-vis both the police and the arbiter, it is important that the crown not be seen to lose. At the same time, the crown is not particularly anxious to win if a victory is to involve a full-blown trial. A decision by the defence to contest the issue of guilt by trial represents both an affront to the prosecutor's ratification of the presumption of administrative regularity and a threat to his precariously-balanced workload.

The prosecutor's dependence on guilty pleas thus modifies the traditional role of defense counsel, transforming him from advocate to coach, for his efficiency is in large measure dependent on his understanding of the needs of his professional counterpart in the conflict system. The premium on guilty pleas makes them something of a commodity of exchange, facilitating transactions in which a reduction of charges, either in kind or quantity, or a blurring or omission of the more provocative qualities of the crown's case can be purchased by a plea of guilty.

Thus, even in a conflict system theoretically designed to preclude compromise, there are substantial pressures which make for a "regression to a state of cooperation".[28] The cooperation, however, is achieved by subordinating the interests of the litigants to those of the crown and defence in their

own relationship of bilateral monopoly. These actors will produce a cooperative determination, expressed in a formula compatible with the norms to which the adjudicative apparatus is committed, but one which has nevertheless been re-interpreted and modified by operational concerns peculiar to the professional participants. Apart, therefore, from the theoretical limitations on adjudication which derive from the abstraction necessary to accommodate the problem unit to the mechanism intended for its resolution, there are operational limitations deriving from the pressures on the adjudicative forum and its personnel to cooperate, or if not overtly cooperate, to intervene and supercede the interests of the litigants. In the result, the interests of the litigants will be submitted, either alternatively or sequentially, to at least two levels of abstraction: (1) to effect a redefinition of the parties and their dispute to accord with the conflict ethic of the adjudicative mechanism, and (2) to effect a redefinition of the appropriate normative solution to accord with the operational concerns of the professional adversaries.

7. Alternatives to the Adjudicative Forum

Adjudication, then, does not define the criminal process. Trials by battle are unpredictable and consequently pose a threat to the caseload management needs of the professionals in the conflict system. Resort to adjudication is therefore an undesirable outcome from the point of view of the professional adversaries, for their own relationships require that they "strive towards an ever-widening extension of the area of predictability and calculability of results."[29] The trial thus becomes the repository for termination of unsuccessful attemps at pre-trial resolution. In a continuum of conflict resolution mechanisms, adjudication represents the ultimate technique for disposition of those items in the process which have proved resistent to other forms of intervention, or, more significantly perhaps, for disposition of those conflict units which have not had access to legitimate, non-adjudicative forms of conflict resolution.

It is, moreover, problematic whether it is helpful to retain the adjudicative ideal as a paradigm or model with which to define the criminal process. Particularly in the context of continuing relationships between victim and offender, it would appear appropriate to develop forums in which the structure and dynamics of the conflict-solving device do not dictate a subordination of the interests of the litigants, forums in which conflict resolution *per se* has a higher premium than the institutional commitment to maintaining the primacy of its value system. If the adjudicative apparatus must necessarily operate by polarizing and exploiting conflict, it is constitutionally unsuited for the ordering of relationships in which interdependence and reciprocity are part of the logical structure.

Moreover, conflict generated by continuing associations is not the most appropriate vehicle for normative exploitation. If the needs of adjudication

require that victims and offenders be recruited for normative careers, it would be preferable to enlist strangers at the outset, rather than employing adjudicative interventions to create a clientele of professional strangers. Where the criminal event is but one of a multiplicity of connections linking the parties in a continuing association, it suggests the need for conflict-solving mechanisms in which the terms of reference extend beyond the legally relevant and permit conflicts to move toward solutions on other than an impersonal, act-oriented basis. The need, in other words, is for a visible, non-stigmatizing medium which would permit the renegotiation and termination of relationships in a context which alerts the parties to the social significance of their acts and impresses upon them some appreciation of their relative functional responsibility for conflict.

While adjudication is useful, and perhaps essential, for the effective affirmation of societal norms, it is nevertheless a system which is predicated on the assumption that there are irreconcilable differences between the parties. That premise is incompatible with the requirements of relationship-oriented social ordering and suggests that adjudication ought properly be employed only when the need to impose controls on the consequences of conflict compels its invocation. In this light, dyadic conflict within a context of continuing bilateral relationships represents a unique potential for non-adjudicative dispute resolution.

NOTES

[1]In the sense used by Lon L. Fuller in "Human Interaction and the Law", *American Journal of Jurisprudence*, 14-15 (1969-70), 1-36, esp. pp. 2-5, *viz.* to designate a code that develops out of human interaction and the concomitant need to facilitate the prediction of social response; a "language of interaction".

[2]A term adapted by Max Weber, *Law in Economy and Society*, (New York: Simon & Schuster, 1954), 213; employed by David Matza, *Delinquency and Drift*, (New York: John Wiley and Sons, Inc., 1964), 119 to describe a variety of justice most closely approximated by the family court; the judge or kadi operates with an extremely wide frame of relevance in which, in principle, everything matters; and extended in this instance to include primitive clan, tribal or community arbiters.

[3]Lon L. Fuller, "Adjudication and the Rule of Law", in L. Friedman and S. Macaulay, ed., *Law and the Behavioural Sciences*, (New York: The Bobbs-Merrill Company, Inc., 1969), 736-745, at 740.

[4]*Ibid.* Fuller makes the same point in virtually identical terms in "Collective Bargaining and the Arbitrator", *Wisconsin Law Review*, (1963) 3-46, at 19, adding that contracts, elections and adjudication are all forms of social decision in which the affected party is afforded an institutionally guaranteed participation.

[5]Jerome Skolnick, "Social Control in the Adversary System", in *Journal of Conflict Resolution*, 11(1967), 52-70, at 53: [A]ll conflict systems share a similar problem of social control; that problem is conflict maintenance or the control of tendencies toward cooperation."

[6]Lon L. Fuller, "Mediation—Its Forms and Functions", in *S. Cal. Law Review*, 44(1970-71), 305-339, esp. pp. 328-330.

[7]Lon L. Fuller, "Adjudication and the Rule of Law", *supra*, note 31, at 740.

[8]Georg Simmel, *Conflict & The Web of Group Affiliations*, trans. by Kurt Wolff and Reinhard Bendix, (Free Press: London, 1955), at p. 15:

> [T]he vitality and the really organic structure . . . in order to attain a determinate shape, needs some quantitative ratio of harmony and disharmony, of association and competition, of favorable and unfavorable tendencies.

[9]Vilhelm Aubert, "Competition and Dissensus: Two Types of Conflict and of Conflict Resolution", in *Journal of Conflict Resolution*, 7(1963), 26-42, at p. 27.

[10]On this point, see also Lewis A. Coser, *Continuities in The Study of Social Conflict*, (Free Press: New York, 1967) at pp. 20-30:

> "The sources and incidence of conflicting behavior in each particular system vary according to the type of structure, the patterns of social mobility, of ascribing and achieving status and of allocating scarce power and wealth, as well as the degree to which a specific form of distribution of power, resources, and status is accepted by the component actors within the different subsystems. But if, within any social structure, there exists an excess of claimants over opportunities for adequate reward, there arises strain and conflict.... Any social system implies an allocation of power, as well as wealth and status positions among individual actors and component subgroups.... [T]here is never complete concordance between what individuals and groups within a system consider their just due and the system of allocation. Conflict ensues in the effort of various frustrated groups and individuals to increase their share of gratification."

[11]Thomas C. Schelling, *The Strategy of Conflict*, (Oxford University Press: London, 1963), 4.

[12]*Ibid.* The term "pure conflict" refers to a degree of polarization in which accommodation is precluded, with the consequence that a successful outcome is available only to one party, and that outcome must necessarily be at the expense of the other party. The example cited is that of unlimited warfare in which the mutual ambition is total annihilation of the antagonist. As we shall see, however, pure conflict can also be used to describe the position of the antagonists in the criminal adjudication process.

[13]*Ibid.*, 83.

[14]Vilhelm Aubert, "Competition and Dissensus, etc.", *supra* note 37, at 30-31.

[15]*Ibid.*, at 31-33.

[16]Vilhelm Aubert, "Courts and Conflict Resolution", in *Journal of Conflict Resolution*, 11(1967) 40-51, at p. 41.

[17]Oran R. Young, "Intermediaries: Additional Thoughts on Third Parties", in *Journal of Conflict Resolution*, 16(1972), 51-65, at p. 52, n. 2:

> If the intervening third parties are powerful players, for example, the issues involved in the interaction of the original players may be superseded, and the interests of the original players may be overshadowed by the interests of the intervenors.

[18]Thomas C. Schelling, *The Strategy of Conflict*, *supra* note 39, at p. 83.

[19]Stephen Schafer, *The Victim and his Criminal*, (New York: Random House, 1968).

[20]It might well be suggested that this perspective accounts in part for the rather low priority accorded to the principle of compensation in the criminal process. Although the principle is recognized in the Criminal Code and hence can be said to have been accorded formal recognition, the limitations on its theoretical scope and practical application suggest that it is a principle which is not easily accommodated within the adjudicative forum.

Section 653 of the Criminal Code permits an order against an offender convicted of an indictable offence to pay "an amount by way of satisfaction or compensation for loss or damage to property suffered by the applicant as a result of the commission of the offence." The section is limited to property losses from indictable offences, and then only on application by the person aggrieved. Section 663(e) empowers the courts to impose conditions upon an offender if he is placed on probation, one of the possible conditions being that the offender "make restitution or reparation to any person aggrieved or injured by the commission of the offence for the actual loss or damage sustained by that person as a result thereof." Although this provision allows for restitution in cases of bodily injury as well as property loss, it can only be invoked where there is a probation order; moreover, because it is limited only to "actual loss", it is doubtful whether it extends to compensation for pain and suffering.

In any event, these powers are used relatively infrequently by the courts. [See, for example, Professor Allen M. Linden's paper, "Restitution, Compensation for Victims of Crime and Canadian Criminal Law", Law Reform Commission of Canada, Sentencing Project.] The limitations on the scope and use of the powers of compensation and restitution may to some extent derive from the fact that they raise issues of the victim's functional responsibility for criminal events—issues which are not compatible with unequivocal determinations with respect to guilt or innocence. Thus, although such interests may be accorded formal recognition, they may be incapable of reformulation into unambiguous normative terms with reference to specific victims and offenders.

[21]If at this point one should conclude that adjudication should be replaced or supplemented as a mechanism for participation in the process of social ordering, one is apparently assigned to the camp of the "behaviorists". See Herbert L. Packer, *The Limits of the Criminal Sanction*, (Stanford: Stanford University Press, 1968), esp. pp. 12-13, where he characterizes as behaviourists those who see the occurrence of crime as merely one symptom among many that social intervention is necessary; moral fault being incapable of definitive allocation, it is not a factor in the decision to intervene. A somewhat more sympathetic representation is that of Paul N. Savoy in "Toward a New Politics of Legal Education", *Yale Law Journal*, 79 (1969-70), 444-504, at 497:

> A number of psychiatrists, psychologists and sociologists are suggesting that it might make more sense to view the phenomenon of crime as a process of social interaction in which the legal process itself plays a critical role, rather than seeing it as an objectively given form of individual conduct. This kind of perspective would require us to dismantle the entire conceptual apparatus of *actus reus* and *mens rea* and to begin to understand crime not as the behaviour of an individual offender, but as a complex set of offender-victim-police-court interactions.

It should be mentioned, however, that Packer, at p. 245 implicity recognized the criminal process as an instrument of public policy; and at p. 69 he observed that "the singular power of the criminal law resides not in its coercive effect on those caught in its toils but rather in its effect on the rest of us." That effect is seen, at p. 64, as a "complex psychological phenomenon meant primarily to create the conscious morality and the unconscious habitual controls of the law-abiding."

Curiously, however, Packer does not acknowledge the similarity between this position and that of the behaviourists: if deterrence operates unconsciously to eliminate the necessity of a conscious choice between good and evil, this is presumably consistent with the position attributed to the behaviourists, that choice is externally conditioned and that, accordingly, free will is an illusion.

[24]Jerome H. Skolnick, *Justice Without Trial*, (New York: John Wiley & Sons, Inc., 1966), p. 13; John Hogarth, *Sentencing as a Human Process*, (Toronto: University of Toronto Press, 1971), p. 270.

[25]The term "clients" is employed somewhat tentatively in this context, particularly because crown counsel tend to assume a quasi-magisterial posture, representing the interests of the state rather than those of individual complainants. Conversely, it may perhaps similarly be questioned whether defence counsel can be said to represent clients for their professional ethic tends to translate itself more into a commitment to institutionalized processes than a commitment to their clients. Thus, the Barrister's Oath for admission to the Law Society of Upper Canada provides, in part, that "[i]n fine, the Queen's interest and your fellow citizens' you shall uphold and maintain according to the constitution and law of this province". The Cannons of Legal Ethics approved by the Canadian Bar Association provide in Canon 1(1) that the lawyer "owes a duty to the State, to maintain its integrity and its law and not to aid, counsel or assist any man to act in any way contrary to those laws".

It is significant that both the Barrister's Oath and the Canons of Ethics appear to assume a symmetry of interests between the Queen/State and the citizen/client; or, alternatively, in the event of perceived dissonance, the first obligation is owed to the State. For an excellent, if rather blunt, exposition of how these competing obligations tend to be reconciled, particularly in the lower criminal courts, see Abraham Blumberg, *Criminal Justice*, (Chicago: Quadrangle Books, 1967).

[26]See, for example, the observations of Peter Laurie in *Scotland Yard/A Study of the Metropolitan Police*, (London: Penguin Books, 1972), at p. 218: "In the vast majority of cases, the real trial is conducted privately and informally between the detective and the accused in the privacy of a cell, or crouched in the court hall; the decision which they come to is then quickly rubber-stamped by the court, whose only real function is to pass sentence."

It is likely that the British barrister's commitment to his role as an advocate, together with the immunity from his client provided by the solicitor system, reduces the pressures on counsel to make such accommodations; the primary responsibility for negotiation therefore lies with the police. In the Canadian criminal context, the commitment to client representation rather than to institutional processes is slightly greater than in England, and lawyers are accordingly inclined to take a more active role in these negotiations.

[27]Thomas C. Schelling, *The Strategy of Conflict*, *supra* note 39, at p. 89: The Mixed-motive game is one in which there is a "mixture of mutual dependence and conflict, of partnership and competition. . . . It deserves to be emphasized that non-zero sum games can as properly be classed under theory of partnership as under theory of conflict."

[28]P.S. Gallo, Jr. and C.G. McClintock, "Cooperative and Competitive Behavior in Mixed-Motive Games", in *Journal of Conflict Resolution*, 9(1965), 68-77, at p. 68.

[27]Jerome Skolnick, "Social Control in the Adversary System", *supra*, note 33, esp. pp. 57-59.

[28]Skolnick, *ibid.*, at p. 68.

[29]Lewis A. Coser, *Continuities in the Study of Social Conflict*, (New York: The Free Press, 1970), 23.

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Foreword

In developing more detailed proposals on the basis of *Principles of Sentencing and Disposition* (Working Paper No. 3) the Commission has already issued working papers on *Restitution* and *Compensation* (No. 5) and *Fines* (No. 6). The present working paper on Diversion has to be viewed in the context of these other papers.

The Commission has been engaged almost from its inception in exploring and developing the possibility of diversion and has conducted a major experiment which is described in the background volume, "*Studies on Diversion*".

An examination of Diversion and its place in the administration of criminal justice is necessary for several reasons. Too many forms of socially problematic behaviour have been absorbed by the criminal law in recent history and this trend needs to be reversed. One way of doing so is through the process of decriminalization–the elimination of offences. This approach unfortunately has not shown itself to be always successful. Even when offences are eliminated, problematic behaviour often remains, has to be dealt with, and may lead to the use of other charges. Diversion, in this context, represents an approach which recognizes that problems exist and cannot just be defined away but seeks solutions which minimize the involvement of the traditional adversary process and maximize conciliation and problem settlement. The full force of the criminal process can thus be restricted to offences which raise serious public concerns.

The working paper attempts to define the various stages of diversion in order to clarify where and when certain procedures may apply. It concentrates on the pre-trial stage where diversion can be developed as a formalized option. However, it does make the important point that there is a responsibility at each stage to justify the further use of the criminal process. The paper recognizes that behaviour such as fights within the family or between friends as well as certain property offences may or may not be defined as "criminal" depending on available solutions in the community. It also recognizes that the police serves many functions and that they too will define and process some forms of "crime" in the light of their own resources. In many ways the paper attempts to build on the best practices already in use and recommends that these practices be extended and legitimated as viable options in the administration of criminal justice.

In order to structure the process of diversion more formally and more concretely, three things are necessary. First, the practice of diversion needs to be extended and documented within the limits of the present legal framework. Secondly, the Commission is engaged in procedural studies in the pre-trial area, one of which, *Discovery* (Working Paper No. 4), has been completed but others are still in process. Thirdly, before recommending specific changes the Commission needs extensive feedback on the basic outline of Diversion as presented in this paper. Diversion, even more than other measures of disposition in criminal cases, depends on the understanding and cooperation of the public and we therefore urge the public to express its views to the Commission.

Diversion

1. Diversion: A Matter of Restraint

Most criminal incidents do not end up in the courts. Decisions by the victim or a by-stander not to call the police or the exercise of discretion by police not to lay charges, but to deal with the incident in another way, or a decision by the prosecutor to withdraw the charges are as old as the law itself. In some cases, dealing with trouble in a low key is far more productive of peace and satisfaction for individuals, families and neighbourhoods than an escalation of the conflict into a full-blown criminal trial. In resolving conflicts within the family, between landlords and tenants, businessmen and customers, or management and labour, citizens and police have always been reluctant to use the full force of the criminal law. This absorption of crime by the community, police screening of cases out of the criminal justice system, settling of incidents at the pre-trial level, or using sanctions other than imprisonment are examples of what is commonly referred to as diversion.

Underlying diversion is an attitude of restraint in the use of the criminal law. This is only natural for restraint in the use of criminal law is demanded in the name of justice. It is unjust and unreasonable to inflict upon a wrong-doer more harm than necessary. Accordingly, as an incident is investigated by police and passed along the criminal process an onus should rest upon officials to show why the case should proceed further. At different stages in the criminal justice system opportunities arise for police to screen a case from the system, the prosecution to suspend charges pending settlement at the pre-trial level or the Court to excercise discretion to withhold a conviction or to impose a sanction other than imprisonment. At these critical points within the criminal justice system, the case should not be passed automatically on to the next stage. The principle of restraint requires that an onus be placed on officials to show why the next more severe step should be taken.

Placing such an onus on officials would be a departure from existing law and practice in some respects, but it is completely in accord with reason and justice. Since all sanctions are imposed only at a cost in human and financial terms, it is reasonable that such costs should not be imposed needlessly. Instead of automatically proceeding from complaint to arrest to charge, trial, conviction and imprisonment, it makes sense to pause and justify proceeding to the next more serious and costly step. The amendments in the law of bail and provision for conditional or absolute discharge are in

part a recognition of the need to proceed with restraint and to justify further proceedings. Placing an onus on officials to justify proceeding to the next step gives effect to the principle of restraint, encourages diversion in appropriate cases and makes decision to divert visible and accountable.

2. How Broad is the Term "Diversion"?

From what has just been said the term diversion is used to cover programs serving a wide variety of functions:

(1) *Community absorption:* individuals or particular interest groups dealing with trouble in their area, privately, outside the police and courts.
(2) *Screening:* police referring an incident back to family or community, or simply dropping a case rather than laying criminal charges.
(3) *Pre-trial diversion:* instead of proceeding with charges in the criminal court, referring a case out at the pre-trial level to be dealt with by settlement or mediation procedures.
(4) *Alternatives to imprisonment:* increasing the use of such alternatives as absolute or conditional discharge, restitution, fines, suspended sentence, probation, community service orders, partial detention in a community based residence, or parole release programs.

When "diversion" is used to refer to such a wide range of functions as indicated above, care is needed in specifying just what type of diversion is under discussion. No one definition of diversion seems capable of comprehending everything done in its name. It is often said, for example, that diversion is designed to take or keep a case "out of" the criminal justice system. It can readily be seen, however, that this is not always so. In most diversion programs, the client or offender has at least entered the criminal justice system to the extent that the police take action or charges are laid. This is so even where the case is referred by police to such community agencies as hospitals, schools, or children's services. Thus, some persons say that diversion is really any attempt to lessen or minimize contact between the offender and the criminal justice system. Hence, dispositions that serve as alternatives to jail are called "diversion". In this sense diversion is hardly a directing "out of" or "from" the criminal justice system. Only where community organizations, institutions, families, or individuals deal with trouble privately, is there truly diversion "from" the criminal justice process.

Programs designed to improve the capacity of the individual, the family, the school or community to handle its own troubles may be more properly seen as "prevention". A dispute, quarrel or other anti-social conduct should not always be looked upon as an excuse to use the criminal law or

even to refer a case to institutional health or welfare facilities. "Prevention" may often best be accomplished by programs that encourage and strengthen the citizen's or community's resources and capacities to deal with trouble on an informal basis outside the criminal justice, health or welfare systems.

While diversion has been used in some jurisdictions to refer to a policy of minimizing contact with the criminal justice system from arrest through bail, sentence of imprisonment and release on parole, the concern in this paper is with pre-trial diversion. The Working Paper on Imprisonment suggests guidelines for the exercise of restraint in the use of correctional facilities through sentencing and release procedures. As indicated in the next section, diversion operating privately in the community, the school, the shop, or the market place is really absorption or prevention, and as such related to, but outside of the criminal justice system. Police screening and pre-trial diversion are clearly within the scope of criminal dispositions and deserve special recognition at this time.

3. Diversion at what Stage?

(1) *The Community*

To the extent that they are intended to deal with cases without resorting to the criminal justice system at all, diversion programs tend to operate in the community as private systems. For many years, for example, professional bodies have had the power to discipline their own members for offences that could be termed criminal. In more serious cases the offence may be dealt with both by the professional body and the criminal courts. Universities and, above all, schools have a long history of bringing "in-house" offences before their disciplinary boards rather than calling in the police. Large businesses have private security forces and may deal with thefts, frauds and other damage as management problems without referring the matter to the courts. Housing developments, too, are turning to private security forces to handle an array of problems independently of the official criminal justice system. Indeed, private security forces now outpace the police in numbers and growth.

Private security forces, however, do not always absorb conflict or criminal incidents or deal with them independently of the criminal justice system. In some cases large institutions apprehend and investigate minor offences that take place on their premises but use the courts in order to get a final solution. The private security force ends up as a funnel to divert minor cases into the courts. In some cities such an organized use of the criminal courts by industrial or corporate persons adds considerably to the workload of the criminal justice system.

Organized attempts to use community based alternatives to the criminal justice system are becoming increasingly common and are used by police and

others as a means of diverting offenders from criminal processes. Detoxication centres, drug crisis centres, family crisis centres, youth service bureaus and various mental health clinics, among others, offer care, information, advice, counselling or referral services to people in trouble.

As already indicated, dealing with trouble privately is still the norm in our society. Furthermore, unless the power and interest of the state is to be greatly expanded into what has hitherto been regarded as the private realm, no case can be made for expanding criminal processes to include conflict resolution by institutions or private agencies. This is not to deny a public interest in knowing that these private systems operate fairly and are not oppressive to the individuals concerned.

(2) *The Police*

Police exercise their discretion to screen cases out of the criminal justice system. Very often this may be the case with juveniles or young offenders. It is not a new function for the police. They have always exercised a discretion not to lay a charge but take a youthful offender home to his parents and let him go with a warning. Similarly, in some driving offences, cases involving alcohol or drugs, incidents of disorderly conduct, or deviant behaviour suggesting mental illness, among others, the police have used their discretion to reprimand, counsel, mediate or settle cases, or to refer the incident out of the criminal justice system to health, welfare, or other agencies without further action being taken. Such screening is a recognition that the community does not always expect the police or others to deal with minor conflict or trouble through arrest and prosecution.

Is police discretion in screening cases out of the criminal justice system consistent with the ideal of equal justice under law? If A and B come to the attention of the police and the circumstances of the two are not distinguishable, then A and B should be treated alike. If A is screened out it would be unjust to proceed with charges against B unless different circumstances warrant a different disposition. In other words the decision to lay charges in one case and to screen out in the other must have some rational basis that will stand up to examination. The policies upon which the decisions are based should be stated publicly and followed in individual cases. Such policies should, as far as possible:

(a) identify situations calling for charge rather than screening out;

(b) establish criteria for the decision to charge rather than screen out;

(c) require a charging option to be followed unless the incident can be screened out.

Situations that might well be screened out rather than dealt with by charge are identifiable from current police practices, and include among others:

(a) incidents involving juveniles or the elderly;
(b) family disputes;
(c) misuse of alcohol or drugs;
(d) incidents involving mental illness or physical disability;
(e) nuisance-type incidents.

Criteria to be considered in deciding that a charge should or should not be laid might include:

(a) The offence is not so serious that the public interest demands a trial.
(b) The resources necessary to deal with the case by screening out are reasonably available in the community.
(c) Alternative means of dealing with the incident would likely be effective in preventing further incidents by the offender in the light of his record and other evidence.
(d) The impact of arrest or prosecution on the accused or his family is likely to be excessive in relation to the harm done.
(e) There was a pre-existing relationship between the victim and offender and both are agreeable to a settlement.

The assumption is that police and prosecutors should continue to exercise discretion not to lay charges in proper cases, and that such use of discretion should be increased. The equal application of justice under law at this level should be encouraged through the development of express policies and criteria as indicated above. In the background, awaiting the outcome of decisions to charge or not to charge, is the court. It, too can have an influence on pre-trial practices so as to encourage equal justice under law. As indicated later, it is not suggested that the court should supervise or control prosecutorial policy. At the same time, should cases be presented to the court that do not appear proper for prosecution considering the express policies and criteria governing the laying of charges and prosecutions, the court would always be able to enter an absolute or conditional discharge. Thus, indirectly, the position of the court as a back-stop, so to speak, should encourage equal application of prosecutorial and police discretion in laying charges and prosecuting cases.

The Commission is well aware that to ask police forces to screen out cases according to stated policy and guides for decision is to break new ground. It may be difficult and frustrating in some cases to develop such policies or guides. Yet, if the administration of justice is to be visible, fair and accountable, there can be no turning away from this task. Clearly, if the policies and guides are to be workable and fit the reality of the local

community, police forces and crown prosecutors across the country should have an opportunity to share in their development.

The Commission is also aware that carrying out a screening policy with some degree of uniformity and consistency may require additional police resources. Whether the screening should be done at the police station level and whether the additional police manpower should have any special training or experience are questions that deserve consideration.

It should also be noted that if restraint in the use of the criminal process is to be successful at the police level, society must reward police for making screening decisions. At present the incentives and rewards open to police encourage the laying of charges, not screening out. Police forces are judged on their "clearance" rate – how many charges laid. Budgets tend to be tied to the notion of law enforcement and charges laid rather than the less visible social service and screening aspects of police work. Overtime is paid for appearing in court as a witness, and in some cases this can act as a considerable financial incentive to charging and keeping a case before the courts. Not only performance, budgets and payment for overtime but policies for promotion and advancement as well must be used so as to reward, to a greater extent than is now the case, police work and decision-making at the social service and pre-trial level.

(3) *Pre-trial Diversion*

Once a complaint has been laid and carried before a justice of the peace, he endorses the complaint thus converting it into an "information". It is the information which is the basis of the criminal prosecution. Under law, the prosecution of cases is under the control of the Attorney-General. The courts have very little control over decisions by the Crown to proceed with cases, to drop charges, to suspend charges or to enter a stay of proceedings. If the conduct of prosecutions leaves something to be desired, the remedy lies in public criticism in the press or in the legislature. The judicial branch, historically and constitutionally, has been kept separate from the executive branch of government in this respect.

It is the crown prosecutor, then, not the police, who has legal responsibility for laying charges and conducting prosecutions. In practice the day-to-day business of deciding whom to prosecute and on what charge is left to the police. Often the prosecutor will not know anything about a case until he walks into the courtroom and is handed a sheaf of cases for prosecution that morning. If he has time, considering the evidence and the law, he may then decide that the charge ought to be changed or the prosecution discontinued. For the most part, however, experienced police officers have developed a professional expertise in these matters that enables busy prosecutors to delegate to them the day-to-day decisions in laying charges. In

serious cases or cases otherwise raising a doubt, the police will consult the prosecution as to the correct charge. The existence of prosecutorial discretion to select cases for prosecution, to pick the appropriate charge, to vary or withdraw charges, delay or simply stay proceedings is not in doubt.

The principle of restraint should also apply at the prosecutorial level. The proposals for pre-trial settlement in this paper would encourage the Crown to exercise its traditional power to select cases for prosecution in court. While a charge has been laid, is it necessary that the further stages of trial, conviction and sentence be followed in every case? Can some cases be dealt with formally within the criminal justice system, at the pre-trial level, without going any further? On an *ad hoc* basis the Crown, in some areas does withdraw charges upon representations by lawyers for the defence indicating that the accused is deserving of leniency and has agreed to make restitution and pay back the harm done. Particularly where the victim is agreeable to such a disposition, the Crown may then decide that the public interest does not demand a prosecution and agree to drop the charges. Not only in cases of damage to property, but cases revealing an element of mental illness, very youthful or elderly offenders, or cases which under the circumstances are more a social dispute than a major criminal offence, may, with the consent of the victim and the prosecutor, be dealt with by way of settlement. The agreement by the offender in such cases may be to make restitution, to undergo counselling, treatment or to take up training, education or work programs for a stated period.

Such pre-trial settlement or intervention is consistent with the principle of restraint, but in the name of justice and equality deserves to be put on some rational and organized basis. This means that a policy of pre-trial intervention be publicly stated and that such policies, in so far as possible should:

(a) identify situations calling for pre-trial intervention rather than trial; and
(b) establish criteria for the decision to proceed to trial rather than to divert the case for settlement.

It is not likely that pre-trial settlements should be restricted to specific offences such as theft under $200.00, shoplifting, and so on. The labels that we hang on offences frequently cover a very wide range of circumstances. For example, should a young man open his neighbour's door and remove a bottle of Scotch from the table, this is an offence of break and entry as well as theft. In all probability, however, the circumstances would not be so grave as to prohibit a pre-trial settlement providing the neighbour, offender and prosecutor were content with that type of disposition. It is even difficult to rule out offences of violence against the person, for the most common offence in this category is assault. As indicated by the research in East York,

in almost eighty percent of assaults the victim and offender knew each other either in a family context, or in a neighbour or acquaintance relationship. Other data shows that assaults often arise out of drinking or other social situations.

Particularly where there has been a prior relationship between the victim and offender and where such relationship is likely to continue despite the criminal event, pre-trial settlement or diversion may be appropriate. Indeed, the policy underlying pre-trial settlement should permit settlement without restriction as to specific offences, but impose a limitation in those cases where the public interest is so great that pre-trial settlement would depreciate the seriousness of the offence or the general preventive effect of the law.

Inevitably this will mean, to some extent, that in some areas of the country certain events will be thought proper for diversion while in others the same incidents may be proceeded with to trial. This can be objected to on the ground that it does not promote equal justice for all. It should be recognized, however, that equal justice is not an absolute to be pursued to the exclusion of all other values or considerations. If the resulting inequality is not gross it may be worthwhile to put up with it in order to secure other desirable objectives. One such objective in the criminal justice is to permit innovation. Probation, for example, was a direct result of such innovation by the judges and only later did the practice receive legislative recognition. Accordingly, some local variation in rather minor matters should be permitted despite its conflict with the ideal of equal justice under law. Under such a policy it is hardly conceivable that murder, rape, and robbery, for example, would be diverted to pre-trial settlement. The public interest in these types of cases is very high and, even if the victim and offender were agreed that under the circumstances such an offence could be dealt with without going to trial, other values would weigh in favour of public prosecution. The administration of justice is to some extent a local matter and ought to reflect local values and encourage innovation, but not at the expense of larger social interests.

In order that the decision to divert certain cases for settlement be visibly fair and accountable, however, criteria for guiding the pre-trial settlement decision should be developed. In most areas of the law affecting individual liberty or property, where it is possible and feasible to do so, the policies and criteria governing decision-making are articulated and written down. This becomes even more important should pre-trial settlement become an official part of criminal dispositions, as we recommend, and its administration is to be above charges of discrimination or partiality. If pre-trial settlement were made visible, and broad criteria of eligibility and procedure were introduced, risk of unequal exercise of discretion would be reduced. There would be a better understanding of why discretionary

decisions are made and the purposes of the criminal law would become more clear and satisfying to participants and observers alike.

The danger exists that in attempting to reduce practice to writing, the resulting guidelines will be unrealistic. This in turn may distort existing practices and produce pressures on officials to ignore the guidelines and return to their former practices. Experience with the Bail Reform Act is an illustration of the need to proceed with the help and experience of police and others in trying to capture discretionary practices and write them down as guides to future action.

In attempting to give express recognition to police or prosecutorial discretion not to proceed with a case, one problem arises from the nature of police and prosecution work itself. As with other institutions, criteria for decision-making are to some extent shaped by the internal workload, working conditions, and policies of the organization itself. Criteria for police or prosecution use in screening or diverting cases may not be particularly focussed on the victim as the Commission thinks they should be. Rather, the demand to get the job done on time, or to handle the case in such a way as to obtain recognition or promotion, reporting requirements, or the shortage of manpower may all have more effect on the decision to proceed with a case than the more ideal purposes of criminal justice. Another factor that may inhibit police in using discretion in this regard is the fear of public criticism that the discretion is exercised on an improper basis.

Keeping in mind the necessity for sound police screening practices, the need to give a role to victim and the community interests in dispositions and the need to take advantage of police and prosecutorial experience, the following factors may be useful in developing a set of guidelines for pre-trial diversion programs:

(a) the incident being investigated cannot be dealt with at the police screening level;
(b) the circumstances of the event are serious enough to warrant prosecution, and the evidence would support a prosecution;
(c) the circumstances show a prior relationship between the victim and offender;
(d) the facts of the case are not substantially in dispute;
(e) the offender and victim voluntarily accept the offered pre-trial settlement as an alternative to prosecution and trial;
(f) the needs and interests of society, the offender and the victim can be better served through a pre-trial program than through conviction and sentence;
(g) trial and convictions may cause undue harm to the offender and his family or exacerbate the social problems that led to his criminal acts.

It should be emphasized that none of these criteria would affect the existing power of the prosecutor to withdraw charges or affect the power of the court to dismiss charges, should the prosecution be resumed, or to enter an absolute or conditional discharge.

(4) *The Court*

At a fourth stage the principle of restraint in using criminal processes and sanctions can be exercised by the judge. The court has a very wide power to impose a sentence other than imprisonment such as absolute or conditional discharge, restitution, fine and probation. In addition, other community based sanctions deserve consideration such as community service orders. While community based sanctions will be the subject of another Commission Working Paper, it may be useful to make one or two observations at this point. While judges may say that they do presently exercise restraint and imprison only as a last resort, it is difficult to assess that position. First of all in sentencing we have not developed good data collection. Judges do not get good statistical feedback on their sentencing practices, nor can they compare them with sentencing practices in neighbouring courts. For example, while we say that in cases of possession of marijuana few are prosecuted and almost none go to jail, yet in 1973, approximately 800 young persons were imprisoned for this offence in Canada. Thousands of others were not. What made the 800 cases an exception? Good data collection would enable us to give an explanation. Imprisonment is supposed to be used as a last resort, but the most recent published data by Statistics Canada, on an all-Canada basis showing imprisonment in cases of summary conviction under the Code is for 1968. It shows that for some assaults, obtaining food and lodging by fraud, and other minor offences, from 10 percent to 38 percent of dispositions were by way of imprisonment. Can the principle of restraint be made more effective by established policies, standards and guidelines for judges in sentencing, followed up by efficient data collection and feedback on sentencing practices?

In addition, isn't there room for sanctions enabling convicted persons to work, and in some cases to use part of the wages for restitution to the victim? If surveillance is necessary in some cases, can greater use be made of community residential centres and week-end detention so as to enable the offender to continue his job and maintain constructive links with the community?

At the court level the principle of restraint, as the Commission states in its Working Paper on Imprisonment, requires a more careful application, particularly in the use of imprisonment. In Canada there is a high rate of imprisonment compared to other countries. In addition, we usually send persons to prison not because of crimes of violence, but because of

convictions for property offences, offences against the public order or other offences not involving violence to the person.

Almost fifty percent of men imprisoned in provincial and federal institutions are imprisoned for non-violent offences against property. Most of these persons are young, unemployed or underemployed at the time of the offence and rather poorly educated. Among these non-violent offences, the average loss in individual offences is below $200.00 and a $500.00 "haul" represents a big case. About 50 percent of the victims in these property offences resulting in jail terms are not individuals but corporate bodies: businesses, schools, or institutions. Fourteen percent of first offenders convicted of a non-violent offence against property go to jail. Fifty percent of second offenders in this category go to jail.

At the same time we realize the limits of imprisonment in reducing recidivism. The deterrent effect of sanctions generally is perceived to be low and not surprisingly so when it is realized that in non-violent offences, the percentage of crimes cleared by police is low. The deterrent or educative effect of the criminal law is probably found in the certainty of arrest and publicity of the process rather than the increased severity of imprisonment as compared to a community based sanction.

If imprisonment is restricted to those whose crimes pose a serious risk to the life or limb of others, to those whose crimes are so reprehensible that deprivation of liberty is the only adequate response, or to those who refuse to pay fines or comply with other voluntary sanctions, then we must contemplate sentencing many more men to community based dispositions.

Such dispositions might well address themselves not only to the question of restitution to the victim and adequate supervision in the community but to the equally important question of upgrading the offender's economic and social skills. This will mean a substantial increase in the demand for community based health services, job training programs, work, counselling, residential and other social services. This is not to suggest that community based dispositions will greatly reduce crime, but simply to suggest it probably is less wasteful, less destructive of human dignity and more likely to bring improvement in individual cases than imprisonment. For the victim, community based dispositions should at least bring restitution and compensation, and society will likely find that its interests and security are reasonably protected as well.

If we are prepared to have an increase in community based dispositions, it becomes important to see whether community resources can handle this change in practice. Specifically, are there programs available in the community for supervising offenders in doing work such as cleaning up waste from public areas, assisting the elderly in clearing snow from sidewalks, and so on? Are there sufficient counselling services to give young people advice

and training in life skills, in making job applications and holding a job? Are there enough family counselling services, psychiatric services or job training programs?

Not only is there a need for the local community to do an inventory of its services and organized programs available to the court or police, there is a need as well to consider the adequacy of the delivery system. Is it enough simply to have an office downtown or a telephone number in the book? Are there sufficient personnel, volunteers as well as paid professionals, to see that these services are used to advantage by offenders?

4. Issues in Pre-trial Settlement

While the Commission is of the view that restraint in the use of the criminal law should be exercised at each of the four stages of the criminal process, particular attention in this Working Paper will be given to the relatively new suggestions for diversion in the form of pre-trial settlement.

This alternative disposition should be consistent with the values and principles set out in earlier Commission Working Papers, particularly Working Paper No. 3, The General Principles of Sentencing and Dispositions. One of the prime values society seeks to promote is the freedom and dignity of individual members of society. This value is promoted through law, including the criminal law which is called in by way of support only as a last resort. In using the criminal law, however, restraint is needed in order to maximize freedom and human dignity within society. Diversion is desirable to the extent that it maximizes such freedom and dignity, and it will tend to do so where the criteria already referred to are met and where the processes of the criminal law are used with restraint and directed towards the reconciliation of the offender with the victim and society. Finally, diversion should be formalized to the extent that it is necessary to achieve procedural fairness in the making of decisions to divert and to the extent that such decisions be visible and accountable.

In the light of these values and other considerations, the Commission offers the following outline as a basis for discussion.

While encouraging the development of sound police and prosecutorial discretion not to charge, there should also be room for mediation or settlement of some cases after charges have been laid. In all cases the court would be available as a backstop to divert through discharge those cases that may have been brought up for prosecution despite their apparent eligibility for pre-trial diversion.

Pre-trial settlement decisions ought to be under the control of the Attorney-General through the crown prosecutor. Since it is undesirable to build up another correctional bureaucracy at the pre-trial level, it is suggested

that once the decision to divert the case for settlement is made, the case be referred out to a community agency or service. It would be the responsibility of the agency to bring the victim and offender together and work out a suitable settlement. Preferably, the settlement should take the form of a written agreement or contract clearly setting out the terms to which the offender is bound. The agency would also be responsible for seeing that the contract was carried out and reporting to the prosecutor on the progress of the case. If the offender failed to carry out the agreement, the prosecutor would have to be satisfied that there was a wilful default and be prepared to make a decision to resume criminal proceedings against the offender. If the contract were satisfactorily performed, the prosecutor would withdraw the charges. On the basis of this proposed model some particular issues should be examined.

(1) *Should a Charge be Laid?*

If the criminal law processes are to be used with restraint, pre-trial settlement procedures should not depend on vague allegations of wrongdoing, delinquency or deviant conduct. As growth in pre-trial settlement programs continues, there is a real risk that police screening practices will be relaxed and large numbers of persons who formerly would have been dealt with outside the criminal justice system will now be brought into formal pre-trial diversion programs. Were this to happen it would be unfortunate. While the criminal justice system, including any proposed pre-trial settlement program, may have a general deterrent or a general preventive effect, its use for this purpose or for the purpose of rehabilitation must be exercised with restraint. Indeed, as indicated in earlier working papers, the best way of dealing with some offences may often be to do as little as possible. For this reason it would be unfortunate if pre-trial diversion were used as a means whereby a larger and larger proportion of people in trouble were discouraged from handling their own problems and encouraged or obliged to turn to state-run criminal justice programs.

One way to reduce court intake of minor offences would be to decriminalize certain offences. Yet to take certain conduct right out of the criminal law does not always result in a satisfactory solution. The objectionable conduct remains to be dealt with somehow by health or social welfare law, or by private suit in civil court or, perhaps, through insurance. To the extent that conduct does remain within the reach of the criminal law, however, one way of ensuring that pre-trial diversion schemes do not needlessly bring individuals into the criminal justice system is to require that a charge be laid.

The requirement of a charge would also make it easier to put teeth into a pre-trial settlement law. If the settlement agreement breaks down it may be desirable to resume criminal proceedings. Laying the charge prevents any

limitation date from running out, and the charge also lays the basis for informed consent.

(2) *Should Consent be the Basis of Pre-trial Settlements?*

Recognition of the inherent dignity of man and his capacity to make choices affecting his welfare, and the need for reconciliation between victim, offender and society require that pre-trial settlements be based on consent—the consent of the victim, that of the offender and of the Crown.

In the interests of justice, neither victims nor offenders should be denied the right to have the case go forward to the court. As a general rule the victim, as citizen, should not be denied his right to lay a private information even if the Crown does not think the case merits a public prosecution.

Even where prosecutorial policy is not to proceed with charges in certain types of cases, as in family quarrels, or shoplifting, for example, the complainant might still be left with the opportunity to lay a private information and proceed on his own in the criminal courts. Under present law, however, the Crown is able to take over or suspend such private prosecutions. In addition, unnecessary prosecutions may be tempered by the power of the court to grant an absolute discharge. The fact that restitution or settlement was offered by the offender, but refused, would thus be a factor to be considered in sentencing and dispositions.

Nor should an offender be denied the opportunity to plead not guilty and seek an acquittal in the courts. At the same time, serious cases should not be hidden from public prosecution simply because the victim and offender prefer a private settlement. The Crown in the public interest may well decide that the case is one that should be heard in the criminal court.

What kind of consent is adequate for a diversion program? Is it sufficient, as in probation and parole, to ask the offender whether he agrees to such a disposition without taking much time to explain what is involved? The extent to which safeguards might be expected in the matter of consent, must, in part, be measured against the risks involved or the rights to be waived by consent.

At present, if complaints of criminal wrong-doing are brought against an accused by police, he has a right to know specifically what offence is alleged; it is not enough to make vague references to delinquency or anti-social conduct. In addition, if the accused is arrested he has certain rights to bail, and if he is detained in custody he must be brought before a magistrate within twenty-four hours or within a reasonable time. Upon being questioned by police, the accused, in general, need not give answers but if he does, subject to the required warning about evidence being used against him,

there is no general right against self-incrimination. Accordingly, whereas the consent of the offender to enter into a diversion or settlement agreement makes sense from a correctional or rehabilitative point of view it carries important legal implications for the accused, particularly in so far as it may affect his right to a trial, or encourage him to waive his right to remain silent. In addition, under present law, despite any undertaking the Crown may give, any statements made in the course of the pre-trial settlement would probably be admissible in criminal proceedings at a later stage.

It goes without saying, that to be voluntary the choice should be made in full knowledge of the facts and of the possibility of charges being resumed should the accused not fulfil his obligations under the program. In other words, a pre-trial diversion program should be based on an intentional, intelligent and voluntary participation by the accused. It is probably not essential to the notion of fairness that an informed waiver of rights be made in open court; it is probably sufficient that the offender be fully advised of his rights in an informal out-of-court appearance.

It should also be fairly clear that a voluntary decision is more likely to be assured where the accused is advised by competent counsel. In this way, persons who feel that they were in no way responsible for the trouble or offence complained about might question the sufficiency of the evidence and avoid being pressured into settlement to avoid a criminal prosecution. No pressure should be put upon the accused to secure his entry into a pre-trial program but, realistically, it may be impossible to prevent persons consenting to a pre-trial program even though they may feel they have done no wrong. No doubt some persons plead guilty in criminal courts now, just to avoid the hassle and delay of a contested trial. Good police work, professional prosecutors and availability of defence counsel should reduce this risk to a minimum.

Objections can be raised against consent on the ground that the choice between pre-trial settlement or trial is not free but induced. The issue, though, is not whether the choice is "free" but whether the choice was presented under oppressive circumstances. It is not the offering of choices to an accused that arouses concern, but the offering of choices under oppressive or unconscionable circumstances.

(3) *Should the Offender be Required to Admit Responsibility?*

Entry into a pre-trial settlement program should not be conditioned upon an admission of "guilt", but on an informal admission of the facts alleged against him. While seeking a guilty plea may be explained as a means of getting the accused to accept his responsibility in the matter and hence an element in his rehabilitation, the same end may be achieved by less drastic means. All that is needed is an informal and out-of-court acknowledgement of

partial or full responsibility for the harm complained about. In addition, to require a pre-trial admission of "guilt" overlooks the fact that it is mediation and settlement, not adjudication, that is needed in some cases and that is why they are considered for pre-trial settlement in the first place.

(4) *How are Cases to be Terminated?*

If pre-trial settlement takes place after a charge is laid, the Crown is in control of the proceedings. It is the responsibility of the Crown then to decide whether or not a case has been successfully completed. If the settlement has been successfully completed, the charges should be withdrawn. While there is nothing in present law to require withdrawal of charges in such a case, in practice the prosecutor would, no doubt, give such an undertaking at the time the pre-trial option was offered to the offender. In this connection an amendment to the law barring prosecution on the same charges or the relaying of charges may help to engender confidence in the kind of pre-trial settlement proposed here. As indicated later, present law does nullify charges that are not proceeded with, but this in itself may not be a sufficient safeguard.

Unsuccessful cases may present greater problems. If the prosecutor is satisfied that the settlement contract has not been completed, what recourse should he have? First, as in fines, it is only in cases of wilful default that the issue of further sanctions should be of importance. Assuming an inexcusable default on the part of the accused, what should be done? Nothing at all? Should the contract be sued on as in civil cases? Or should the Crown resume criminal proceedings against the accused?

There is much to be said for doing nothing at all. Considering that a prior decision would already have been made that the case was not one of such general public importance as to warrant a criminal trial, how much weight should be placed on the fact that the offender does not keep his promises and has not made redress? The chances are probably 50-50 that he won't be heard from again in any criminal matter. If he is proceeded against, his very default is likely to be held against him at time of sentence and lead to a more severe sentence than the original offence may have warranted.

At the same time, there is much to be said for the view that an offender should not simply be allowed to get away with it. If something must be done, is it feasible to enforce the pre-trial settlement contract by using the civil courts? Those who have tried to sue defendants and collect damages in the civil courts may well be skeptical of the right to sue. Typically, offenders are men of little financial means, so that even if a default judgement were obtained, it might not be worth very much. In addition, unless the expense of suing in the civil courts were borne by the Crown, the costs would be a chilling prospect for most victims. Thirdly, the unfamiliarity with enforce-

ment procedures in the civil courts will doubtless act as a deterrent to some victims who then would be left "holding the bag". Offenders, realizing that the law has no teeth, would be tempted to abscond or pay little attention to their obligations under the pre-trial settlement agreement.

Simply doing nothing or relying on civil enforcement does not seem to be satisfactory. While compliance with pre-trial settlement contracts may be expected in the majority of cases, some offenders will not discharge their obligations unless they are made to. In probation, this problem has usually been met in two ways. Wilful failure to comply with the terms and conditions of an order is itself a separate offence, alternatively the defaulting offender can be re-sentenced on his original conviction. On balance, the option of resuming criminal proceedings in the event of a wilful breach of a pre-trial settlement order would probably be desirable.

If proceedings are to be resumed in such a case, what provision should be made for those cases where the offender denies he was in default? In parole, at present, a parole contract may be terminated by the Parole Board and no reasons need be given. As the Commission makes clear in its Working Paper on Imprisonment, however, release procedures having a direct effect on the liberty of the offender ought to be taken fairly. It follows that the decision to terminate a pre-trial settlement contract and to resume criminal proceedings should also be seen to be fair. Among other things, this should mean providing reasons for the termination when requested, and permitting a challenge to the factual basis upon which the decision to terminate was made. In practice, such provisions for fairness are not likely to mean substantial delays in proceeding with cases. As in parole, most offenders are likely to be well aware of any difficulties that may be developing in respect of the pre-trial order and will probably have had various warnings from a supervising officer before the decision to terminate is made.

(5) *Is there "Double Jeopardy"?*

Where breach of a pre-trial settlement order is followed by a decision to terminate the order and resume criminal proceedings, does the offender stand in double jeopardy? Acknowledging that there are various aspects to "double jeopardy", it can hardly be said that to resume criminal proceedings in such circumstances violates the notion that a man should not be charged twice for the same offence. Instead, it is a case of suspended charges being resumed.

What would be regarded as unfair and contrary to public policy would be a resumption of criminal proceedings following a successful completion of a settlement or diversion order. Should such a travesty of justice take place there is probably nothing in existing law to remedy it, except the jurisdiction inherent in the court to prevent an abuse of its process. It is doubtful, however, whether the courts have extensive authority to supervise prosecu-

torial practices to forestall a miscarriage of justice and to secure the confidence of accused persons contemplating diversion. As indicated earlier, there should be a legislative statement providing for a withdrawal of charges and barring further prosecution for that offence once the pre-trial diversion program is successfully completed.

(6) *Is there a Right to a Speedy Trial?*

If charges are laid but suspended during the course of a pre-trial program, can the offender complain that he is being denied his right to a "speedy" or early trial? Such a complaint is difficult to imagine where the accused has voluntarily chosen to enter into the very program that was designed as an alternative to trial. Unlike the United States, Canada offers no constitutional right to an early trial. The law, however, does encourage prosecutors to get on with a case involving a stay of proceedings, for the stay is limited.

(7) *Will the Rules of Evidence Apply at Pre-trial Settlements?*

To the extent that the rules of evidence are designed to keep some kinds of evidence out of the court, there should be no problem. These rules are useful in the adversary process of the court battle but in a mediation or settlement procedure they may find less rigid application. Other adjudicative or settlement forums in labour law, family law or administrative law do not appear to have much trouble in determining what evidence is relevant and material to the issues at hand without getting caught up in the formal rules, or hopelessly lost in irrelevancies.

To the extent that the rules of evidence would permit statements made in the course of a pre-trial settlement to be used against the accused in later criminal proceedings, there is cause for concern. If the policy of the law is to encourage settlements and the keeping of promises, it ought not to be undermined by an unrestricted rule permitting admissibility of statements made in the course of a settlement. This may be ensured by leaving a discretion with the judge to exclude evidence under certain circumstances as outlined in the Commission's Working Papers on Privilege in the law of evidence.

(8) *Will the Accused in a Pre-trial Settlement Have a Criminal Record?*

It is essential to distinguish between what police do in order to keep track of convictions and what employers and others do in asking "do you have a criminal record? ". Most persons would concede that it is useful to the administration of justice for police to keep a record or file showing persons convicted in the courts and that information showing previous convictions

should be available at time of sentence. On the other hand, many people do think it undesirable to discriminate against a person in employment or business practices generally, simply because, at one time, he or she was convicted of an offence.

In pre-trial settlements it will only be common sense to collect basic data on the cases that are dealt with. This does not mean that discrimination in employment practices, for example, should be ignored. Accordingly, the laws relating to criminal records should be reviewed to take into account those persons who may have been charged but diverted to a pre-trial settlement.

(9) *How to Assure Equal Consideration in Diversion?*

How can equal consideration in diversion be assured? What assurance does an accused have that his case has been fairly and properly considered for pre-trial settlement? Rather than think in terms of a "right" to diversion, it may be more helpful to consider the position of the accused at sentence generally. For example, for years the policy of the law has been to encourage the use of probation, particularly in the case of first offenders. This does not give the first offender a "right" to probation, but the policy does require the judge to consider probation as an alternative to imprisonment and does require that a decision to impose imprisonment in such a case be justifiable.

Dispositions, whether pre-trial or after conviction, should be made openly according to stated policy and within express guidelines. In this way decisions become open and accountable. They are made accountable in the sense that the decision may be challenged as being inconsistent with the stated policy or guidelines or made in complete disregard of them. That is, the decision should be open to review, much as some parole and correctional decisions should be open to review.

(10) *Should Pre-trial Settlements be Conducted in Public?*

One of the great assets of our system of law is that trials must be public. Some inroads have been made on this principle in cases of juvenile delinquency and reporting is restricted in some other circumstances. On the other hand, pre-trial negotiations have usually been conducted behind closed doors. A pre-trial settlement, however, involving as it does some stigma and some acceptance of responsibility in the face of a criminal charge, is not a run of the mill pre-trial procedure. The public are entitled to know what harm was done not only to the victim but also to the community. To this extent it is necessary that the circumstances be made public knowledge. It can be said, too, that a public hearing is necessary in order to make sure that the offender or victim is being treated fairly in the settlement process.

While a great deal of weight must be given to the view that decisions be open, visible and accountable, it does not necessarily follow that the actual

process of settlement be conducted in public. The decision to divert to settlement should be public and accountable. Yet the actual working out of the agreement can hardly be done under the glare of television cameras. In labour law and family law, settlements are usually arrived at in lawyers' offices or in some semi-private atmosphere. The decision whether or not to divert those cases involving a high public interest would be a public one. Once the case is designated as suitable for pre-trial settlement, however, it is difficult to see a high public interest in the actual give and take of the settlement process. Since the proposed scheme also depends upon the consent of the victim and offender and contemplates the availability of counsel, it is not likely that individuals could be abused by a settlement arrived at in the semi-private atmosphere of a voluntary agency, for example. On balance, therefore, the Commission is of the view that the decision to divert to pre-trial settlement be open, visible and accountable, but that the actual mediation or settlement process be permitted some degree of privacy.

(11) *Will Diversion Programs Save Us Money?*

The claim is frequently made that diversion is cheap. It is said to be cheaper to use a pre-trial settlement than to proceed to court and conviction. It is said that it is cheaper to use a community based sanction such as probation than to use imprisonment. Such arguments sound plausible. Yet the difficulty of accurately assessing the cost of any program or service in criminal justice is great.

Certainly diversion programs, if they are to be successful, will require the expenditure of large sums of money in new areas, while reducing the demand for services in other parts of the criminal justice system. More money will have to be spent on justice training programs for one thing and increasing staff at the prosecutor's office. Increased demands will be made upon the community for services including probation, child welfare, family counselling, manpower training, special education of different kinds, and medical or health services. Already, probation, for example, or counselling through drug and alcoholic addiction agencies in some communities are overloaded.

To some extent increased manpower requirements in some of these services may be met through increased use of volunteers. Yet volunteers need places to work, professionals to assist and give guidance and resources to work with.

Diversion programs will not solve the problems that lead some people to crime; it will only make it possible to see those problems more clearly and come to grips with them at the community level. Diversion makes it possible for our responses to crime to be more rational, informed, open and selective. Yet it all depends on governments supporting the community and its agencies to make that intelligent response in a timely way.

Conclusion

The continuing interest in diversion is fed by many sources. There is a growing disappointment with an over-reliance on the criminal law as a means of dealing with a multitude of social problems. At the same time we realize that rehabilitation does not provide a full answer to the problem of crime. Increasingly, it is recognized that crime has social roots and sentencing policies must take into account not only the offender but the community and the victim as well.

As research throws more and more light on what actually happens in the name of criminal law, it becomes clear that the court and correctional processes are not able to deal well with many of the cases brought to their doors. The adversary processes of the court are not able to deal adequately with cases that require mediation or settlement. The correctional institutions cannot easily offer services and help that is community based. The victims and offenders and witnesses who are exposed to the criminal processes frequently find them impersonal, frustrating and difficult to understand.

Research also makes it clear that most of the conflict or trouble that could be called "criminal" often is absorbed by the family, the school, the place of work or other branches of community life. Police work is deeply involved in diversion, in finding health and social service solutions to problems that might otherwise end up in courts. Prosecutors have a wide discretion to decide that certain cases be settled at the pre-trial level rather than automatically processed for trial. Increasingly, these practices and others are being given formal encouragement through official programs and projects or through legislation.

There is a need to examine diversion then, not only because it is already upon us and is often the norm but also because diversionary practices can give rise to greater satisfaction between victims and offenders. The general peace of the community may be strengthened more through a reconciliation of the offender and victim than through their polarization in an adversary trial. To put the matter another way, there is a need to examine diversion at this time if only to discover again that there is much value in providing mechanisms whereby offenders and victims are given the opportunity to find their own solutions rather than having the state needlessly impose a judgment in every case.

For these and other reasons, diversion programs have grown up without much direction or control in various jurisdictions and are currently the centre of attention. Yet, in so far as diversion is seen to be an alternative to imprisonment, it may be an illusion. As indicated in the Commission's Working Paper on Imprisonment, if we are to reduce the jail population many property offenders now being imprisoned will have to be sentenced to alternative community based dispositions. Many diversion programs, however, are located at the pre-trial level and are directed to juveniles or young offenders involved in delinquency or near-delinquency that ought not to warrant imprisonment in any event.

Diversion is also seen by some persons not only as a means of reducing imprisonment but also of keeping offenders out of the criminal system in the first place. This, too, may prove to be an illusion unless the principle of restraint is exercised. Under existing law and practice, incidents involving delinquency or other minor trouble are absorbed by the community or dealt with by police and prosecutors without charges being laid or without going to trial. The cases are screened out; they are referred to parents, agencies or hospitals or they are settled informally and are not characterized as criminal in nature. The danger is, then, that thoughtless development of diversion programs will have the opposite effect to that which is intended: they will result in greater, not less, exposure to the criminal justice system. Accordingly, it will be important to ensure that diversion to pre-trial settlements draws upon cases that would otherwise have gone to court. Even then there is a danger that pre-trial diversion will attract only cases that otherwise would have been dealt with by dismissal, conditional or absolute discharge or probation.

The diversion to pre-trial settlement of some young persons would provide an opportunity to engage them in paying restitution, as well as involving them in job training, employment, counselling or training in "life skills" that so many of them lack. As an additional benefit, diversion encourages the community to participate in supporting the criminal justice system to a degree that was not always possible under the trial model. Professionals, para-professionals, ex-offenders and ordinary citizens are encouraged to join the delivery of services to the criminal justice system, for the diversion programs rest upon a community base.

An advantage of diversion procedures is the scope they offer for participation by the victim in resolution of the trouble or harm complained about. If there has been a continuing relationship between victim and offender as is the case in many crimes against the person or property, a procedure which enables the parties to come together and with the help of a mediator arrive at a mutually satisfactory settlement is to be preferred in some cases to the adversarial nature of the court trial.

As already indicated, setting up diversion programs will entail risks. Unless police and prosecutorial screening practices are understood and made visible, there will be the temptation to divert for pre-trial settlement difficult cases that would otherwise have been dealt with without charging. It is important, therefore, that diversion be firmly grounded on sound sentencing principles and governed throughout by the principle of restraint with the onus on officials to justify proceeding with a case to the next more serious level.

Despite the risks involved, the advantages of a pre-trial diversion or settlement mechanism from the point of view of society, the victim and the offender alike warrant encouragement. A pre-trial program, based upon the consent of the parties, operating according to stated policies and express guidelines for decision, and run under the supervision of the prosecution by competent administrators supported by community service programs is recommended. Fairness in procedure is important and to this end it is recommended that the procedures be open and accountable. Counsel should be available to ensure that accused persons fully understand what they are consenting to.

Undoubtedly, legislation would encourage the development of pre-trial diversion programs, although other means such as policy statements or declarations of intent may also serve this purpose. In any event, it is clear that it is useful to gather as much experience as possible before being fully satisfied with any such official statements of policy and direction. In addition, diversion will make a heavy call upon community services and will require increases in personnel and budgets.

To conclude, it appears that the criminal law and its processes are a last and limited resort in dealing with social conflict. When it is called upon to deal with conflict and trouble, the criminal law and its sanctions should be used with restraint, and decisions to proceed with criminal processes should be fair, visible and accountable.

In a novel experiment in legal research, East York became, over a period of twelve intense months, a living laboratory. . . . Sponsored by the Law Reform Commission of Canada, the project was the product of a conscious attempt to extend the process of law reform . . . through participation by the community itself.